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THE
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LOCAL GOVERNMENT BOARD *v.* ARLIDGE

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Shaw, Lord Moulton and Lord Parmoor), June 15, 16, 17, July 20, 1914]

[Reported [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109]

Constitutional Law—Government department—Quasi-judicial functions—Need to adopt strictly judicial procedure—Observation of principles of natural justice. Housing—Closing order—Objection—Public local inquiry—Right of objector to see report of inspector and be heard orally by Local Government Board.

Where a government department or other public authority has been given jurisdiction to decide questions affecting the rights and property of the individual it need not adopt strictly judicial methods or procedure, which may, in many points of administration, be entirely unsuitable, but it must observe the principles of natural justice and in that sense act judicially. The assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded, but the authority must deal with the question before it impartially and without bias, and must give to the parties before it the opportunity of being heard and adequately presenting their case, and its decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice, preserving a judicial temper, performing its duties conscientiously and with a proper feeling of responsibility, and availing itself of the powers conferred on it solely for the purpose of carrying into effect in the best way the provisions of the Act from which those powers are derived.

Where a local authority refused to determine an order which they had made under s. 17 of the Housing, Town Planning, &c., Act, 1909, closing a house of which the respondent was lessee under a long lease on the ground that it was unfit for habitation and the respondent appealed to the Local Government Board against that decision,

Held: the Board were not bound to disclose to the respondent the report made to them by their inspector who had held a public local inquiry under s. 39 of the Act, at which the respondent was present and presented his case, nor was the respondent entitled to be heard orally by the Board before they came to their decision; the Board had followed their customary procedure, which was necessary if they were to do their work efficiently; and the decision of the Board dismissing the respondent's appeal could not be impugned.

Certiorari—Public authority—Order imposing liability or determining rights or property.

Per LORD PARMOOR: The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, i.e., acts or orders of a court of law

sitting in a judicial capacity. It extends to the acts and orders of a competent public authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties, e.g., a housing authority.

Notes. The provisions with regard to closing orders and local inquiries are now to be found in the Housing Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 314), ss. 17, 26, 27, 28, 181.

Applied: *Hall* v. *Manchester Corpn.*, post; *R.* v. *Central Tribunal* (1916), 86 L.J.K.B. 799; *R.* v. *London Appeal Tribunal* (1918), 62 Sol. Jo. 383; *R.* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334; *Ridge* v. *Baldwin*, [1961] 2 All E.R. 523. Considered: *Errington* v. *Minister of Health*, [1934] All E.R.Rep. 154; *William Denby & Son, Ltd.* v. *Minister of Health*, [1935] All E.R.Rep. 304; *Marriott* v. *Minister of Health* (1935), 105 L.J.K.B. 125; *Offer* v. *Minister of Health*, [1935] All E.R.Rep. 148. Referred to: *R.* v. *Amphlett*, [1915] 2 K.B. 223; *Cassel* v. *Inglis*, [1916] 2 Ch. 211; *Clements* v. *County of Devon Insurance Committee*, [1918] 1 K.B. 94; *De Verteuil* v. *Knaggs*, [1918] A.C. 557; *Dowling* v. *Great Eastern Rail. Co.* (1919), 88 L.J.K.B. 380; *Wilson* v. *Esquimault and Nanaimo Rail. Co.*, [1922] 1 A.C. 202; *Brown* v. *Dagenham U.D.C.*, [1929] 1 K.B. 737; *Frost* v. *Minister of Health*, [1935] 1 K.B. 286; *Leslie* v. *L.N.E.R. and L.M.S.* (1936), 24 Ry. & Can. Tr. Cas. 182; *Ex-Army Transport, Ltd.* v. *Diamond & Co.* (1936), 24 Ry. & Can. Tr. Cas. 303; *Cooper* v. *Wilson*, [1937] 2 All E.R. 726; *Robins & Son, Ltd.* v. *Minister of Health*, [1939] 1 K.B. 520; *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338; *General Medical Council* v. *Spackman*, [1943] 2 All E.R. 337; *R.* v. *Archbishop of Canterbury*, [1943] 2 All E.R. 791; *R.* v. *Architects' Registration Tribunal, Ex parte Jaggar*, [1945] 2 All E.R. 131; *Stafford* v. *Minister of Health*, [1946] K.B. 621; *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851; *Johnson & Co. (Builders), Ltd.* v. *Minister of Health*, [1947] 2 All E.R. 395; *Darlassis* v. *Minister of Education* (1954), 118 J.P. 452; *Beethem* v. *Trinidad Cement, Ltd.* [1960] 1 All E.R. 274; *University of Ceylon* v. *Fernando*, [1960] 1 All E.R. 631; *R.* v. *Registrar of Building Societies*, [1960] 2 All E.R. 549.

As to the quasi-judicial functions of public authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 716–719; and for cases see 38 DIGEST (Repl.) 100–106. As to closing orders and local inquiries, see 19 HALSBURY'S LAWS (3rd Edn.) 581, 582, 623–626; and for cases see 26 DIGEST (Repl.) 688–692. As to certiorari, see 11 HALSBURY'S LAWS (3rd Edn.) 124 et seq.; and for cases see 16 DIGEST 398 et seq.

Cases referred to:

(1) *Board of Education* v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652, H.L.; 19 Digest 602, *290*.

(2) *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; 54 L.J.M.C. 81; 53 L.T. 157; 40 J.P. 420; 33 W.R. 661; 1 T.L.R. 313, H.L.; 26 Digest (Repl.) 571, *2357*.

(3) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516; 69 L.J.Ch. 299; 82 L.T. 662; 64 J.P. 276; 48 W.R. 403; 16 T.L.R. 251; 44 Sol. Jo. 294, C.A.; 37 Digest 226, *188*.

(4) *The Banshee* (1887), 56 L.T. 725; 6 Asp.M.L.C. 130, C.A.; 1 Digest (Repl.) 278, *1796*.

(5) *A.-G.* v. *Nottingham Corpn.*, [1904] 1 Ch. 673; 73 L.J.Ch. 512; 90 L.T. 308; 68 J.P. 125; 52 W.R. 281; 20 T.L.R. 257; 2 L.G.R. 698; 38 Digest (Repl.) 158, *7*.

(6) *Ex parte Evans* (1846), 9 Q.B. 279; 115 E.R. 1280; sub nom. *R.* v. *Denbighshire Justices*, 1 New Mag. 547; 2 New Sess. Cas. 422; 15 L.J.Q.B. 335; 7 L.T.O.S. 256; 10 Jur. 542; 10 J.P.Jo. 371; 16 Digest 420, *2798*.

(7) *R.* v. *Inham* (1864), 5 B. & S. 257; 4 New Rep. 141; 33 L.J.Q.B. 183; 10 L.T. 456; 28 J.P. 580; 10 Jur.N.S. 968; 12 W.R. 793; 9 Cox, C.C. 508; 122 E.R. 827; 13 Digest (Repl.) 161, *241.*

(8) *Buchanan* v. *Rucker* (1808), 9 East, 192; 103 E.R. 546; 11 Digest (Repl.) 506, *1226.*

(9) *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, *1220.*

(10) *Ochsenbein* v. *Papelier* (1873), 8 Ch. App. 695; 42 L.J.Ch. 861; 28 L.T. 459; 37 J.P. 724; 21 W.R. 516, L.C. & L.J.; 11 Digest (Repl.) 516, *1307.*

(11) *Crawley* v. *Isaacs* (1867), 16 L.T. 529; 11 Digest (Repl.) 511, *1269.*

(12) *Messina* v. *Petrococchino* (1872), L.R. 4 P.C. 144; 8 Moo.P.C.C.N.S. 375; 41 L.J.P.C. 27; 26 L.T. 561; 20 W.R. 451; 1 Asp.M.L.C. 298; 17 E.R. 352, P.C.; 11 Digest (Repl.) 516, *1306.*

(13) *Dent* v. *Smith* (1869), L.R. 4 Q.B. 414; 10 B. & S. 249; 38 L.J.Q.B. 144; 20 L.T. 868; 17 W.R. 646; 3 Mar.L.C. 251; 11 Digest 521, *1354.*

(14) *Boissière & Co.* v. *Brockner & Co.* (1889), 6 T.L.R. 85; 11 Digest (Repl.) 508, *1243.*

(15) *Parsons* v. *Lakenheath School Board* (1889), 58 L.J.Q.B. 371.

(16) *R.* v. *Local Government Board for Ireland*, [1911] 2 I.R. 331; 44 Digest 1315, *r.*

Appeal by the Local Government Board from a decision of the Court of Appeal (VAUGHAN WILLIAMS and BUCKLEY, L.JJ., HAMILTON, L.J., dissenting) reversing a decision of the King's Bench Division (RIDLEY, LORD COLERIDGE and BANKES, JJ.) discharging a rule for a writ of certiorari to remove an order of the Local Government Board into the King's Bench Division to be quashed.

The facts and proceedings are set out fully in the opinion of the Lord Chancellor.

The Attorney-General (*Sir John Simon, K.C.*), *the Solicitor-General* (*Sir Stanley Buckmaster, K.C.*) and *G. A. H. Branson* for the appellants.

Macmorran, K.C., Upjohn, K.C., and *J. Brooke Little* for the respondent.

Their Lordships took time for consideration.

July 20. The following opinions were read.

VISCOUNT HALDANE, L.C.—The question which has to be decided in this case is whether the appellant, the Local Government Board, has dealt validly with an appeal brought before it under the provisions of s. 17 of the Housing and Town Planning Act, 1909. The respondent is the assignee of a lease of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead. On Jan. 12, 1911, the borough council made an order under s. 17 (2) of the Act to which I have referred, prohibiting the use of the house for habitation until in their judgment it had been rendered fit for that purpose. On Mar. 7, 1911, the respondent gave notice of appeal to the Local Government Board. That Board intimated, in accordance with s. 39 of the Act and of the rules which it had made thereunder, that it would not decide the appeal without having held a local inquiry. A public inquiry was, as the result, held on May 24, 1911, before Mr. Edward Leonard, one of the housing inspectors of the Board designated for that purpose, and he also made a personal inspection of the house on June 2 following. The respondent had furnished the Board with copies of reports of certain experts whom he had consulted, such reports being to the effect that the house was perfectly habitable, and that there was no justification for the closing order. The respondent had intimated that he should decline to attend the inquiry, and he did not appear or tender evidence. On June 6 the inspector submitted to the Board his report of the inspection, and on July 29, 1911, the Board, after considering the report and the other documents before them, confirmed the closing order. On Aug. 11 the respondent applied to the Board to state a Special Case under s. 39 (1) (a) of the Act for the opinion of the High Court, raising the points that the order of July 29 was invalid, because (a) the report of the inspector had been treated as a confidential

document and had not been disclosed to the respondent, and (b) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided, in addition to the opportunity which he had had of stating and arguing his case before the inspector. The Board declined to state a Case, and the respondent did not, as he could have done under the Act, apply to the High Court for an order calling on the Board to state it. In the meantime the respondent applied to the borough council to determine the closing order, having regard to repairs which he had effected, and on Oct. 5, 1911, the council refused on the ground that the house had not been rendered by such repairs fit for habitation. On Oct. 19 the respondent appealed again to the Board, this time against the refusal to determine the closing order. On Nov. 25, 1911, the Board gave notice to the respondent of their intention to hold a second public local inquiry with respect to his appeal against the refusal of the borough council to determine the closing order. The inquiry was held on Dec. 8 before the same inspector. The respondent was present with his solicitor and witnesses, and the borough council and the London County Council were also represented. The respondent's solicitor argued his case, and the respondent and his witnesses gave evidence. On Dec. 13 the inspector submitted to the Board his report, together with a shorthand note of the evidence and speeches. On Jan. 8, 1912, the Board intimated to the respondent that it would be willing to consider any further statement in writing which he desired to submit to it. The respondent did not avail himself of this opportunity, but applied for a writ of certiorari to remove the order of the Board into the King's Bench Division to be quashed, on the ground that the appeal had not been determined in the manner provided by the law. The points taken were that the appeal had been decided neither by the Board nor by anyone lawfully authorised to act for them, and that the procedure adopted by the Board was contrary to natural justice in that the respondent had not been afforded an opportunity of being heard orally before the Board. I assume, further, what appears to have been the case, that the point was also taken that the report of the inspector on the second inquiry was not disclosed to the respondent. The point was certainly argued afterwards in the Court of Appeal.

The case was heard before Ridley, Lord Coleridge and Bankes, JJ. Among the affidavits which they had before them was one by Sir Horace Monro, the permanent secretary of the Board, who stated that the decision was come to after full and careful consideration of the reports made by the inspector and of the evidence and documents, including the observations and objections put forward in the correspondence by the respondent's solicitors. He referred to the invitation already mentioned, addressed by the Board to the respondent's solicitors, to place before it in writing any further statement which the respondent might desire it to consider. He said that the appeal had been determined judicially on the report of the inspector, and the evidence taken by him (although without any oral hearing of the respondent beyond that at the inquiry) in the same manner in all respects as it had been customary as regards all other appeals to the Board. He referred to a formal order of the Board, signed by the president and by the assistant secretary, dismissing the appeal. On these facts the learned judges of the King's Bench Division declined to hold that the appeal had not been properly disposed of both in form and in substance. They considered that the statute and the rules made under it, to which I will presently refer, provided for a public local inquiry at which any party interested might appear and state his case orally and that it was not intended that there should be a subsequent hearing before the Board analogous to that before a court of law. They thought that there was nothing contrary to natural justice in such procedure.

The Court of Appeal, consisting of Vaughan Williams, Buckley and Hamilton, L.JJ., by a majority took a different view and reversed the decision. Vaughan Williams, L.J., held that the appeal was one inter partes, the respondent and the Hampstead Local Board being the opposing parties. He thought that the duty of the Board was to hear both sides and to disclose all the evidence of fact placed

before them and the conclusions of law adopted by them as the basis of their decision. He held that the non-production to the respondent of the inspector's reports was contrary to the principles of natural justice, and that, in the absence of a plain direction in the statute abrogating the necessity of observing these principles in dealing with the reports, the principles of English justice had been violated. He appeared further to think that the absence of any statement by or on behalf of the Board as to which of its members considered the appeal was a further objection to the validity of the Board's order. BUCKLEY, L.J., thought the importance of the general question which was raised very great. It was increasingly common for statutes to empower government Departments to decide questions affecting rights of property, and it was of the first importance that their proceedings should be so conducted as to command the confidence of the public, and that the principles applicable to their conduct should be well understood. A mere power to make rules determining the procedure in such appeals did not obviate the necessity of such rules being in accordance with natural justice. It was essential that each of the parties should know the case the other made and should be heard in the other's presence. Assuming that it could be validly provided that the original hearing should assume the form of a statement in writing, it was not clear that a party who subsequently desired to be heard orally could be debarred from claiming to be so heard. The learned lord justice thought that, as the local authority was the authority against which the appeal to the Board was brought, it was in one sense not a party litigant, but, as it could be ordered to make a counter-statement and to pay or receive costs, for all material purposes it was not to be distinguished from a party litigant, and, therefore, the other party ought to know the case it made. Having regard to the terms of s. 5 of the Local Government Board Act, 1871, which constituted the Board and provided that anything to be done on its behalf might be done by the president or any member, or by a secretary or assistant secretary authorised by its general order, the inspector was not within the class of persons who could decide anything. If he made a report on a public inquiry held by him it should be made public. A case could not be argued before one man and decided by another. The respondent had, therefore, no real opportunity of presenting his case when he was invited by the letter of Jan. 8, 1912, to do so, for he was not permitted to see the report. HAMILTON, L.J., was of a different opinion. The practice, he said, of the Board, like that of its predecessor the Poor Law Board, had always been to dispose by correspondence of appeals even in important matters such as an auditor's disallowance of items, and in treating the inspector's report as confidential it was only following an old and well-known practice. The question was whether, if the statute itself did not in terms authorise the practice, it was contrary to natural justice, "an expression sadly lacking in precision." He referred to several precedents, and came to the conclusion that it was a sound inference, to be drawn as a matter of construction, that the legislature, aware, as he took it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board should treat the report as confidential. He was of opinion that what had been done was in accordance with the Act of 1909.

I have thought it important to set out with some fullness the conflicting views in the Court of Appeal. It is obvious that two of the judges there based their conclusions on the principle that in the absence of a direction to the contrary, which they could not find in the statute, the analogy of the procedure in a court of justice must guide them. HAMILTON, L.J., on the contrary, thought that he found in the statute a scheme of procedure which excluded this analogy. Which of these opinions was right can only be determined by referring to the language of the legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in mind, excepting so far as the language enables us to do so. There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is

his own. Such rights are not to be affected unless Parliament has said so. But Parliament, in what it considers higher interests than those of the individual, has so interfered with such rights on other occasions, that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is to-day. I, therefore, turn to the Acts of Parliament which are relevant with the sense that there is little justification for looking in advance for the embodiment of one scheme as more probable than the embodiment of another.

The closing of dwelling-houses as being dangerous or injurious to health, or unfit for habitation, is no new jurisdiction. The Housing of the Working Classes Act, 1890, gave to the local authority the power to take proceedings to enforce penalties and closing orders before courts of summary jurisdiction, to be followed, in certain circumstances, by demolition orders. Under that Act the owner of the house had an appeal to quarter sessions. This power of closing was somewhat extended by the Housing of the Working Classes Act, 1903, but the principle of the application being to a court of justice remained the same. A change of this principle was introduced in the Housing and Town Planning Act, 1909. The local authority was empowered itself to make the closing order, certain conditions having been complied with, and it was given power to determine the closing order if satisfied that the house in respect of which the order had been made had subsequently been rendered fit for habitation. In respect of both a closing order and a determining order, the owner was given a right of appeal. But the appeal was to be, not as before to quarter sessions, but to the Local Government Board. Stringent powers of inspection were given, to both the local authority and the Local Government Board. In the case of an appeal, the procedure as to everything, including costs, was to be such as the Board might by rules determine. The Board was to have power to make such order on any appeal as it should think equitable. It could state a Case, but only on a question of law, for the opinion of the High Court, and could be compelled by the High Court to do so. The rules were to provide that the Board should not dismiss any appeal without having first held a public local inquiry. In the application of the Act to Scotland, the sheriff was to be substituted for the Board. This provision, however, although relied on in the argument before us, throws but little light on the question as to the character of the jurisdiction created by the Act, for, as is matter of common knowledge, the sheriff in Scotland is an administrative as well as a judicial officer, and the Local Government Board in Scotland is, on the other hand, only one of the subordinate Departments under the Secretary for Scotland. It is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported.

When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of presenting adequately the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions.

In this it resembles other great Departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by LORD LOREBURN. In *Board of Education* v. *Rice* (1), he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on anyone who decided anything. But he went on to say that he did not think that it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way which it thought best, always giving a fair opportunity to those who were parties to the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it might itself be the subject of mandamus.

I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible, not only for what he himself does, but for all that is done in his Department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of the Local Government Board Act, 1871, the Act constituting the Local Government Board to which I have already referred. Provided that the work is done judicially and fairly in the sense indicated by LORD LOREBURN, the only authority which can review what has been done is the Parliament to which the Minister in charge is responsible. The practice of the Department in the present case was, I think, sufficiently shown by Sir Horace Monro's affidavit to have been followed. In accordance with that practice the Board, in order to obtain materials with which to decide, appointed one of its health inspectors to hold a public inquiry. This was in accordance with the rules which it had made under the section of the statute which I have quoted and with its usual practice. It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all minutes made on the papers in the office before a decision was come to. It is plain from Sir Horace Monro's affidavit that the order made was the order of the Board, and so long as the Board followed a procedure which was usual, and not calculated to violate the tests to which I have already referred, I think that the Board was discharging the duty imposed on it in the fashion which Parliament must be taken to have contemplated when it deliberately transferred the jurisdiction, first, from a court of summary jurisdiction to the local authority, and then, for the purposes of all appeals, from quarter sessions to an administrative Department of the State. What appears to me to have been the fallacy of the judgment of the majority in the Court of Appeal is that it begs the question at the beginning by setting up the test of the procedure of a court of justice, instead of the other standard which was laid down for such cases in

Board of Education v. *Rice* (1). I do not think that the Board was bound to hear the respondent orally, provided that it gave him the opportunities which he actually had. Moreover, I doubt whether it is correct to speak of this case as a lis inter partes. The Hampstead Borough Council was itself acting administratively, although it had a right to appear, and did appear, before the inspector and on the appeal, and might have to pay or receive costs. For the reasons I have given, I have arrived at the conclusion that the judgments of the Divisional Court and of HAMILTON, L.J., in the Court of Appeal* were right, and that this appeal should be allowed with costs here and in the Court of Appeal, and that the order of the Divisional Court should be restored.

LORD SHAW.—HAMILTON, L.J., delivered an opinion in the Court of Appeal in this case which in all but one particular to which I shall refer so exactly expresses my own judgment, that I feel loth to add any words of my own.* But the action has been represented to be one of such importance that I feel called upon, however reluctantly, to state separately my view.

As to the form of the pronouncement of the Local Government Board. It is said that the appellant, as the lessee of a house declared to be insanitary, is entitled to get behind that pronouncement and to ascertain which, in his great Department of State, were the actual mind or minds which judged his case. I state this simpliciter in order to test it. In my opinion, this demand is unjustifiable. It is not supported by statute, it would be inconsistent with past administrative practice, and it would not tend to, but might seriously impair, administrative efficiency.

By s. 5 of the Local Government Board Act, 1871, provision is made as to the seal, style and acts of the Board. The Board itself is composed of several men of eminence. It is provided by s. 3 that it may appoint secretaries, assistant secretaries, inspectors and others such as may be determined by it with the sanction of the Treasury. And as to its seal, style and acts,

> "a rule, order, or regulation made by the Local Government Board shall be valid if it is made under the seal of the Board and signed by the president or one of the ex officio members of the Board, and countersigned by a secretary or assistant secretary."

It is provided that the production of such primâ facie evidence shall,

> "until the contrary is shown, be a sufficient proof that any such rule, order, or regulation of the Local Government Board was duly made."

It is admitted that in form the decision of the Local Government Board upon the appeal against the decision of the Hampstead Borough Council is according to statute. This is so both as regards the confirmation on July 29, 1911, of the closing order and as regards the confirmation of Feb. 26, 1912, of the refusal of the local authority to determine the closing order. In each case the decision is under seal and is signed by Mr. John Burns, president of the Board, and by an assistant secretary. But it is said that the appellant is entitled to know his particular judge or judges, to individualise the Board, and to demand that that person or those persons so discovered shall give him, the appellant, an audience on the whole material available, including the result of the public local inquiry and the report made thereupon by the Board's inspector. In the first place, of the demand to know the individual judge or judges. How can the judiciary be blind to the well-known facts applicable not only to the constitution but to the working of such branches of the executive? The Department is represented in Parliament by its responsible head. On the one hand, he manages its affairs with such assistance as the Treasury sanctions, and, on the other, he becomes answerable in Parliament for every Departmental act. His Board—that is all the members of it together—may never meet, or they may only be convened on some question

* For judgment of HAMILTON, L. J., see post, p. 16.

of policy; but a determination signed and sealed and issued in correct form, stands as the deliverance of the Board as such, for which determination the president becomes answerable to Parliament. This is the general rule, acknowledged and familiar, of departmental action and responsibility.

With regard to the making of this rule, however, and on the assumption that the grotesque demand to individualise the Department for private purposes is put on one side, the next proposition is that when a public local inquiry has been held in compliance with statute, the person whose interests are affected is entitled to something more—namely, a disclosure of the views of the inspector written out by him, in jottings or otherwise, for the guidance or consideration of the Department in dealing with the case. It is here (and the matter is not a strictly legal one) that I venture to hold an opinion somewhat different from that of HAMILTON, L.J. I incline to hold that the disadvantage in very many cases would exceed the advantage of such disclosure; and I feel certain that if it were laid down in courts of law that such disclosure could be compelled, a serious impediment might be placed upon that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks. The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants, and consultants of various degrees of experience, many of whose opinions may differ, but all of which form the material for the ultimate decision. To set up any rule that this decision must on demand, and as matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, both with efficiency, with practice, and with the true theory of complete Parliamentary responsibility for Departmental action. All this is, in my opinion, implied as the legitimate and proper consequence of any Department being vested by statute with authority to make determinations. This is no way changed by the determinations being, in point of fact, upon appeal from the deliverances of another or inferior authority. The judgments of the majority of the court below appear to me, if I may say so with respect, to be dominated by the idea that the analogy of judicial methods or procedure should apply to Departmental action. Judicial methods may, in many points of administration, be entirely unsuitable, and produce delays, expense, and public and private injury. The Department must obey the statute. For instance, in the present case it must hold a public local inquiry, and upon a point of law it must have a decision of the Law Courts. Quoad ultra it is, and, if administration is to be beneficial and effective, it must be the master of its own procedure, for it must always be borne in mind that its procedure, if not in defiance of elementary standards—say, by hearing one side and refusing to hear the other—is simply the plan which it adopts to satisfy itself that the decision come to by a local authority was a good or a bad decision.

These views may be illustrated by the demand in the present case. The appellant admits that a public local inquiry was held, but he asks: (i) to see as of right what report was made to the Department upon it, and (ii) to be heard thereafter over again on the whole case. I think neither demand to be justified, and with regard to the latter, I would add that the very fact that the Act expressly imposes publicity upon the local inquiry—for reasons, in cases of sanitation and the public interest therein, not far to seek—by implication negatives anything of the kind in regard to the numerous other steps taken in the working of an administrative Department. I entirely agree with HAMILTON, L.J., in his view on this head.

The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. When a central administrative Board deals with an appeal from a local authority it must do its best to act justly and to reach just ends by just means. If a statute prescribes the means, it must employ them. If it is left without express guidance, it must still act honestly and by honest means. In regard to these, certain ways and methods of judicial procedure may very likely be imitated, and lawyer-like methods may find especial favour from lawyers. But

that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation, and the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous. I have looked through these proceedings more than once, and I cannot see from beginning to end of them that the Local Government Board did not act justly to the appellant or to the case. They showed extreme patience, and they handled the case with scrupulous regard to their statutory duties and to the rights of all concerned.

LORD MOULTON.—In the year 1890 an Act was passed dealing with the housing of the working classes, which forms the basis of the legislation to which this litigation relates. Its title is the Housing of the Working Classes Act, 1890, and it will be referred to herein as the principal Act. The scheme for dealing with unhealthy dwelling-houses in that Act rested normally upon the initiative of the local authority on the information of their medical officer of health, but very small executive powers were given by that Act to the local authority in respect of enforcing their views as to a house being unfit to be used as a human dwelling-house. All that they were empowered to do was to apply to a justice of the peace for a summons to the owner and occupier of the house and initiate proceedings by that summons before justices of the peace under the provisions of various sanitary and nuisance Acts. Power was given to justices before whom such proceedings were taken to prohibit the using of the dwelling-house until it had been rendered fit for habitation to their satisfaction. The usual appeal to quarter sessions against any order so made by the justices existed. This enactment underwent various amendments between the years 1890 and 1909, the details of which are not necessary for the purposes of this judgment. But in the year 1909 a new Act was passed, entitled the Housing, Town Planning, &c., Act, 1909, which amended the principal Act and those which had followed it in various matters of prime importance. That which concerns the present case is the procedure of closing orders which it introduced. This procedure differs widely from the procedure for the like purpose under the previous Acts. It gave to the local authority the power of making orders prohibiting the use of a dwelling-house for human habitation until, in the judgment of the local authority, it was rendered fit for that purpose in all cases in which it appeared to them to be unfit for human habitation, and, indeed, it imposed upon them the duty of making such an order if the dwelling-house appeared to them to be in the above state on the representation of their medical officer of health or any other of their officers or on other information given. It directed that notice of such a closing order when made should be forthwith served on every owner of the dwelling-house in respect of which it was made, and any owner aggrieved thereby was given an appeal against the order to the Local Government Board. The local authority was empowered to determine any such closing order if it was satisfied that the necessity for it no longer existed, and if on application by any owner of the dwelling-house to terminate the closing order they refused so to do, that owner had a right to appeal to the Local Government Board against such refusal.

To my mind the above changes go far beyond mere changes in procedure. The closing order was made by them an executive act within the powers of the local authority in cases where, in their opinion, the circumstances justified its being made. They were no longer obliged to seek the authorisation of the magistrates subject to an appeal to quarter sessions. In like manner the appeal to the Local Government Board was made to take the place of the appeal to quarter sessions. I have no doubt that the new procedure as to appeal was intended to be an appeal

to a superior executive body as such, and that it was not intended that the Local Government Board should act in a purely judicial capacity. There is no doubt that it must act "in a judicial temper." Its order might confirm an order of the local authority interfering with the property of a private individual, and thereupon that order would be capable of legal enforcement. In the exercise of such powers the Local Government Board would be bound to treat the matter in a judicial spirit, availing itself of its wide powers solely for the purpose of carrying into effect in the best way the provisions of the Act. But although in this sense it must act judicially, there was not, in my opinion, any obligation upon it to follow wholly or in any special respects the procedure of a court of justice, provided that the procedure adopted by it was consistent with its performance of its duties judicially in the sense to which I have referred. The Act is not silent with regard to the procedure to be adopted by the Local Government Board in the discharge of the above functions. By s. 39 of the Act of 1909 it is left to them to determine by rules what this procedure shall be, subject to two restrictions. In the first place, after giving to them the power to state a Special Case for the opinion of the court on any point of law arising in the course of the appeal, it is enacted that they shall state such a Case if directed so to do by the High Court. In the second place it is enacted that the rules so to be made by the Local Government Board shall provide that the Board shall not dismiss any such appeal without having first held a public local inquiry. The wisdom of this last provision is evident. The local authority, who are empowered to make the original closing order, are presumably acquainted with the local conditions and the actual facts as to the dwelling-house in question. But the Local Government Board can originally have no such special knowledge. In order, therefore, to protect the individual owner fully, the Local Government Board, before deciding an appeal against a closing order, is bound to hold a public local inquiry that it may be able to learn first hand the facts of the case before deciding that the closing order shall be affirmed. The inquiry is termed a "public local inquiry." Although it appears to be novel to speak of a "public" local inquiry being held by the Local Government Board, yet local inquiries have for many years been held by them in connection with the exercise of other functions of the Board, and such inquiries were commonly held in public. The effect of the insertion of the word "public" appears to me to be that every member of the public would have a locus standi to bring before the inquiry any matters relevant thereto so as to ensure that everything bearing on the rights of the owner or occupier of the house affected, or the interests of the public in general, or of the public living in the neighbourhood in particular, would be brought to the knowledge of the Local Government Board for the purpose of enabling it to discharge its duties in connection with the appeal.

Such is the legislation which we have to apply to the facts of the present case. Those facts are very simple. The respondent is an owner of a dwelling-house, No. 83, Palmerston Road, in the metropolitan borough of Hampstead. On Jan. 12, 1911, the mayor, aldermen, and councillors of that borough, who were the "local authority" referred to in the legislation, made an order prohibiting the use of that house for human habitation until, in their judgment, it was rendered fit for that purpose. This "closing order" was in due form and duly served. An inquiry was duly held by the Local Government Board and the closing order was confirmed, and against that confirmation no appeal has been brought. On July 10, 1911, the respondent, through his solicitors, applied to the local authority to determine the closing order on the ground that the necessary and proper repairs had been effected. The local authority did not consider that such was the case, and on Oct. 7, 1911, by an informal notice to the respondent, and on Nov. 2, 1911, by a notice in due and proper form, they informed the respondent that they refused to determine the said closing order. On Nov. 15, 1911, the respondent duly gave notice of appeal against this refusal, and it is out of the proceedings on that appeal that the present litigation arises. All the formalities required by statute, or by the rules made by the Local Government Board under their statutory powers relating to appeals of

the kind in question, were duly carried out. An inspector was sent down to hold a public inquiry. It was held on Dec. 8, 1911. The respondent was represented on that occasion by his solicitor. He was called as a witness on his own behalf, and there is no question that every opportunity was given to him and to every other member of the public of bringing forward any relevant matter at that inquiry. After it had taken place the inspector, who was an expert in such matters, made a personal examination of the house in company with persons representing respectively the respondent and the local authority. He made his report to the Local Government Board, and on Feb. 26, 1912, the Local Government Board made an order in the matter confirming the refusal of the local authority to determine the closing order. On April 18, 1912, the respondent applied to a Divisional Court of the King's Bench Division and obtained a rule nisi, calling on the appellants to show cause why a writ of certiorari should not issue to remove into the King's Bench Division the said order of the Local Government Board of Feb. 26, 1912, in order that it might be quashed on the ground that the Local Government Board had not determined the appeal against such refusal in manner provided by law. I do not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a Department of State as the Local Government Board under statutory powers such as we have here to deal with, but the point was not argued, and I, therefore, assume in favour of the respondent that the procedure he adopted was correct. Cause was shown against the rule, and on Dec. 18, 1912, it was discharged, but on appeal to the Court of Appeal the order of the King's Bench Division discharging the rule was reversed by a majority (HAMILTON, L.J., dissentiente), and it is from this decision of the Court of Appeal that the present Appeal is brought.

Shortly stated, the grounds on which the majority of the Court of Appeal proceeded, was that the procedure adopted by the Local Government Board was contrary to natural justice; first, because the appellant had no opportunity of being heard by the member or members of the Local Government Board, who in fact decided the appeal as to the closing order; and, secondly, because the Local Government Board refused to disclose the report or reports of their inspector who held the public inquiries. I confess that I am unable to understand the meaning of the phrase "contrary to natural justice" in connection with such a matter as is involved in the present case. The original closing order and the refusal to determine it were administrative acts which the local authority was authorised to do in the interests of public health. Their authority was purely statutory, and if the statute had authorised them to do these acts without giving any appeal, the legislation might be considered to be unwisely drastic, but it would have to be recognised and enforced by the courts, and no such question whether or not it was "contrary to natural justice" could possibly be considered by the courts. Such a question would be unmeaning in such a connection. And although the legislature has not followed such a course in connection with closing orders, it is easy to call to mind many matters in which prompt action is so necessary that provisions as drastic as those which I have described might be necessary. Cases of quarantine regulations or the destruction of unwholesome food exposed for sale might under certain circumstances be well left to the decision of executive officers without any appeal being given. In the present case, however, the legislature has provided an appeal, but it is an appeal to an administrative Department of State and not to a judicial body. It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals. Parliament has wisely laid down certain rules to be observed in the performance of its functions in these matters, and those rules must be observed because they are imposed by statute, and for no other reason, and whether they give much or little opportunity for what I may call quasi-litigious procedure depends solely on what Parliament has thought right. Those matters are beyond

the criticism of the courts, and it is not their business to add to or to take away from them, or even to discuss whether, in the opinion of the individual members of the court, they are adequate or not. In the present case they appear to me to be abundantly sufficient to secure that the Local Government Board shall be fully seized of the facts of the case in which it is called in, and that it can and will get all necessary guidance as to the law. But even if my opinion were the reverse it would only indicate that I disapproved of the legislation. It could not give rise to any question as the statutory procedure conforming or not conforming to any notions of my own as to "natural justice."

I shall not, therefore, deal specifically with any of the points on which the majority of the Court of Appeal have criticised the procedure of the Local Government Board on abstract grounds, but there is one point which needs notice, namely, the claim that the respondent was entitled as of right to see the report of the inspector who held the public inquiry. No such right is given by statute or by an established custom of the Department. Like every administrative body the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they make to the Department should be made public. It would, in my opinion, cripple the usefulness of these inquiries. It is not for me to express my opinion of the desirability of an administrative Department taking any particular course in such matters, but I entirely disassociate myself from the remarks which have been made in this case in favour of a Department making reports of this kind public. Such a practice would, in my opinion, be decidedly mischievous. I am, therefore, of opinion that the Court of King's Bench was right in discharging the rule nisi, and that this appeal should be allowed, and that the respondent should pay the costs of all the proceedings.

LORD PARMOOR.—The appellants on Feb. 26, 1912, issued an order under seal, signed by the president and countersigned by an assistant secretary, confirming the refusal of the Hampstead Borough Council to determine a closing order which prohibited the use of the dwelling-house known as 83 Palmerston Road, in the said borough, for human habitation. The respondent is assignee of a lease of the said house for a term of years, of which at the date of the closing order more than fifty years were unexpired. The respondent obtained a rule nisi in the High Court of Justice, calling upon the Local Government Board to show cause why writ of certiorari should not be issued, directed to the Board to remove into court the order of Feb. 26, 1912, on the ground that the Board had not determined the appeal against such refusal in manner determined by law. This rule was discharged on argument, but the decision of the Divisional Court was overruled in the Court of Appeal, and it is against this decision that the appeal is brought to this House.

By the Housing and Town Planning, &c., Act, 1909, a new procedure was introduced in connection with the closing of houses so dangerous or injurious to health as to be unfit for human habitation. The duty was placed on the local authority of making a closing order, if, on the representation of the medical officer of health, or of any other officer of the authority, or on any other information given, any dwelling-house appeared to them to be so dangerous or injurious to health as to be unfit for human habitation. A closing order in the present case was made by the local authority and an appeal against such order was dismissed by the Local Government Board. There is a further provision that the local authority shall determine any closing order made by them, if they are satisfied that the dwelling-house in respect of which the order has been made has been rendered fit for human habitation. An application to determine the closing order was refused by the local authority, and the order of Feb. 26, 1912, confirmed this refusal on appeal. The procedure to be followed when an appeal is brought to the Local Government Board is regulated in and defined by the Act. In the first place, the Board is directed to make rules. Such rules were duly made on Jan. 11, 1910, and were followed in the present instance. In the second place, it is

provided that the Board may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state, in the form of a Special Case for the opinion of the court, any question of law arising in the course of the appeal. Thirdly, it is provided that the Board shall not dismiss any appeal without having first held a public local inquiry. A

No point was raised whether the case was one to which procedure by writ of certiorari was appropriate, and it is not necessary to attempt to define the exact ambit within which such procedure can be properly applied. The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense—that is to say, acts or orders of a court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties. Where, however, the question of the propriety of procedure is raised in a hearing before some tribunal other than a court of law, there is no obligation to adopt the regular forms of legal procedure. It is sufficient that the case has been heard in accordance with the principles of substantial justice. B C

In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must necessarily be had to the nature of the issue to be determined and the constitution of the tribunal. The general tests to be applied have been expressed in two cases which have come before this House, *Spackman* v. *Plumstead Board of Works* (2) and *Board of Education* v. *Rice* (1). In the earlier case of *Spackman* v. *Plumstead Board of Works* (2) the question raised was whether the certificate of the superintending architect was conclusive in fixing the general line of building under the Metropolis Management Act, 1862. Lord Selborne, in the course of his opinion, says (10 App. Cas. at p. 240): D E

> "No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word, but he must give the parties an opportunity of being heard before him and stating their case and their views."

In the present case there are special provisions for procedure, and the Local Government Board have, in my opinion, given the parties a fair opportunity of being heard before them and stating their case and views. In the later case of *Board of Education* v. *Rice* (1) it was held that the Board of Education had not determined the questions submitted to them. It was on this ground that the order of the Board was quashed and a mandamus was issued commanding the Board to determine the real questions submitted for determination. In expressing his opinion to the House, Earl Loreburn, L.C., stated his views on the propriety of procedure: F G

> "In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon anyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their views." H I

Applying this test to the present case, the Local Government Board have given to the respondent a full opportunity of stating his case before them, and the respondent had a further right under the statute to a public hearing at the local inquiry and to bring before the High Court any question of law which might emerge at any stage of the appeal. Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character, appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to

A have the matter determined in a judicial spirit, in accordance with the principles of substantial justice.

The objections raised in the present case range themselves under three heads. The first objection raised by the respondent to the order of the Local Government Board is that there has been no hearing or determination at all before the Board, and that the order complained of has not been made by the statutory tribunal. B If such a contention could be established I agree that a writ of certiorari should issue. I find some difficulty in appreciating the argument on which this contention is founded. In substance the respondent says that his appeal should be heard before some definitely specified person or persons, and that unless this is done the whole matter is coram non judice. In my opinion, such a claim is inconsistent with the ordinary system of procedure when the determining authority is a large C administrative Department. I can find nothing in the statute to indicate that in appeals to the Local Government Board against an order of a local authority, or a refusal to make an order under the Act of 1909, a specialised system of procedure should be adopted. In support of this argument reliance was placed on the affidavit of Sir Horace Monro. This states that after careful and impartial consideration of the facts and evidence given at the public local inquiry, and affording the D respondent an opportunity of making any further statement, the appeal was determined in all respects as appeals have been accustomed to be determined, and that the order was made under the seal of the Board signed by the president and countersigned by an assistant secretary. So far from supporting the claim of the respondent this appears to me to negative conclusively his objection that there was no hearing or determination of the appeal by the Board. The second objection raised E is that the respondent was entitled to see the report of the inspector, and that to withhold this document deprived him of a fair hearing in accord with the principles of substantial justice. The only word in the statute on which a claim to see the report can be based is the word "public" prefixed to "local inquiry." This word is said to have been used for the first time in the 1909 Act. In my opinion, a public local inquiry means no more than that an inquiry should be held in the F locality and open to the public. It was well known in 1909 that the Local Government Board did not in ordinary cases publish the reports of inspectors before whom local inquiries were held. Unless an opposite intention is declared, or can be inferred, a statutory form of procedure should be construed so as to conform to prevailing practice. It was argued that there was a particular reason why in this instance the report should be published on the ground that its non-disclosure would G be an interference with the right to obtain a Special Case for the opinion of the court on any question of law arising in the course of an appeal. It is just possible that the non-disclosure of the terms of the report might make it more difficult in some particular instance to formulate a claim for a Special Case, but in substance the materials on which to base a right to such a case would be independent of the inspector's report and the view of the inspector on a matter of law would not be H material.

The present case is a good illustration. If the respondent was desirous of raising, as a matter of law, any question as to the constitution of the tribunal, the non-disclosure of the report or the right to give oral testimony, all the material for raising any of these questions was open to him quite apart from any information to be obtained from an inspection of the inspector's report. Any opinion expressed I by the inspector on such matters could in no way have altered the legal obligation. It is true that there is no statutory prohibition against the publishing of the inspector's report. If I thought that this non-disclosure deprived the respondent of a fair hearing in accord with the terms of substantial justice, I should accede to the argument on behalf of the respondent, and should hold the same view whether the appeal is to be regarded as a lis inter partes or as a decision on review of the administrative action of the local authority. I am unable, however, to come to any such conclusion, and doubt whether assistance is to be gained from arguments based on analogous cases. The analogy of an official referee referred to in argument

appears to me to have as much weight as the analogies on the other side referred to by the Attorney-General. If the report of the inspector could be regarded as in the nature of evidence tendered either by the local authority or the owner of the house, there would be a strong reason for publicity. In my opinion, it is nothing of the kind, and is simply a step in the statutory procedure for enabling an administrative body, such as the Local Government Board, to hear effectively an appeal against the order of the local authority. The obligation on the Board to hold a public inquiry in the locality is to enable the facts on either side to be ascertained by oral testimony subjected to the test of cross-examination, if either party should so require, and to ensure in this respect a full opportunity to the appellant of being heard before dismissing his appeal against the decision of the local authority.

The third objection raised is that the respondent was entitled to give oral testimony before the determining tribunal in addition to any oral testimony which might be given at the public local inquiry, and that in the denial of his claim to be so heard his appeal had not been determined in accordance with the principles of substantial justice. The provisions of the statute are not inconsistent with the right to give oral testimony, and if in any particular instance the Local Government Board are of opinion that such evidence might help in the determination of an appeal it is within their competency to hear it. I can, however, find no obligation to admit such oral testimony in all cases, and there is a strong inference against the claim in the provision that an appeal shall not be dismissed without first holding a public local inquiry at which there is full opportunity of giving oral testimony. The rules made by the Local Government Board are not framed to allow oral testimony in an ordinary case, and it is extravagant to suggest that these rules are ultra vires having regard to the statutory powers under which they are made. Can it be said that in a case in which the statute gives the right to a public local inquiry, and in which the statutory rules of procedure do not provide for oral testimony before the Local Government Board, the mere refusal to hear such oral testimony amounts to a denial of the principles of substantial justice? I am unable to come to any such conclusion, and it appears to me that in the present case the respondent had every fair opportunity of bringing his case before the determining tribunal, and that he has no substantial ground for complaint. In my opinion, the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*; *Rubinstein, Nash & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

The case came before the Court of Appeal—sub nom. R. *v.* Local Government Board; Ex parte Arlidge—in July, 1913, judgment being given reversing a decision of a King's Bench Divisional Court on Oct. 16, 1913.

HAMILTON, L.J., then read the dissenting judgment referred to by Lord Shaw (ante p. 8). He said: The appellant's points are, first, that he was never allowed to know his judge's name, to see him face to face, or to address him viva voce; and, secondly, that before deciding the appeal, his judge saw, what he himself was never allowed to see, certain material documents, particularly the reports made by Inspector Leonard to the Local Government Board.

By the Housing, Town Planning, &c., Act, 1909, the Local Government Board is made the final judge of appeals under the Act from the local authority. Formally

A the decision is to be that of the Board, and in this case it is so expressed, and is correct in form. Practically I will assume that it is the decision of some particular official, duly deputed for the purpose. The appellant asks who he was. He complains that he was never told. What does this matter? Curiosity apart, there seem to be only two reasons why an appellant should seek, as it is put, "to know his judge." One is to hold him up to public criticism; this may be quite right, B but it is none of our business. The other is in order that he may be able to shape his arguments in accordance with the deciding official's personal equation. I think, therefore, that this claim is only part of the general claim for a "hearing" coram judice, for a viva voce appeal, for the right to stand in person before the judgment seat.

In my opinion, whether the deciding officer "hears" the appellant audibly C addressing him or "hears" him only through the medium of his written statements, is, in a matter of this kind, pure procedure. The practice of the High Court, past and present, as to hearing motions on affidavits, and taking evidence before special examiners, or the examiners of the court, shows that there is nothing universally essential in the judge seeing and hearing the witnesses for himself. One must remember what the subject-matter of these appeals is. Under this jurisdiction D only two questions can come before the Local Government Board on appeal, first: "On such and such a day was the appellant's house fit or unfit for human habitation?" Secondly: "Since the closing order was made, has it or has it not become or been made fit?" This is not the first occasion on which such an objection as the appellant's might have been taken. There is an analogous case. The Public Health Act, 1875, by s. 247 (8), permits any person, who is aggrieved by E an auditor's disallowance of an item during the audit of the accounts of an urban authority, not being a council of a borough, to proceed either by certiorari to get the disallowance removed and quashed, or to appeal against it to the Local Government Board [see now s. 229 of Local Government Act, 1933]. The matter may readily involve pecuniary interests as grave as those involved in the present case. The practice of the Local Government Board has always been to do what its F predecessor, the Poor Law Board, did—namely, to dispose of such an appeal simply by correspondence between the aggrieved person, the auditor, and the Board, supplemented occasionally by an inquiry into facts, which is held by an inspector: LUMLEY'S PUBLIC HEALTH ACT (7th Edn.) 557.

In *A.-G.* v. *Merthyr Tydfil Union* (3) it became necessary to argue before this court, on the one side and on the other, whether in the particular case the aggrieved G person ought to have resorted to an appeal to the Board instead of taking the course which was taken. It is scarcely possible that the practice, stated in so standard a work as LUMLEY'S PUBLIC HEALTH ACT, can have escaped the notice both of counsel and of the court, yet neither from the Bench nor at the Bar was any suggestion made that the parties aggrieved were right in not appealing to the Local Government Board because the Board's "hearing" by correspondence was a pro- H cedure both inconvenient and contrary to natural justice. The fact is that for such appeals as are here in question one scheme of procedure may be better than the other, but both the oral and the written scheme remain rival procedures still, and the Act leaves the Board free to elect between them.

The provision that a public local inquiry must be held in a certain event suggests that the legislature contemplated that the other proceedings might be private. It I is said that a written argument is an illusory thing, that there is no eloquence, or at least no persuasion, but in speech. Parliament should know something about that, and it has left the matter to the Board. I find the contention bewildering. Are reasoning and writing mutually exclusive processes? The appellant desires to enjoy what one of his counsel felicitously calls "the bound and rebound of ideas and arguments between the Bench and the Bar." This invests with authority a practice (or should I say a foible?) of judges, which I had believed to be pardonable, and hoped to be not without its uses, but I am unable to see that it is the very pith of the administration of natural justice. It is said again that the appellant

is entitled to a reply. Apart from the separate question of his right to see all the materials eventually considered by the deciding officer, I think this is only procedure again. Even in the various Divisions of the High Court, practice varies both with regard to the number of speeches allowed to counsel and to the stages at which they are made, and there is also a difference between High Court and county court practice with regard to the defendant's address to the court. The bare question of a concluding address by the appellant seems to me to be only a question of the cursus curiæ.

The real and the only difficult question before us is this. Before he gave his decision, the officer of the Board saw what the appellant never saw, the inspector's reports. I assume on the evidence that the officer considered Inspector Leonard's report of the first inquiry as well as of the second, and, failing production of them, that, in addition to reporting the evidence, they stated his opinion on the case, his impression of the witnesses, and the observations which he made on his visits to the premises. Primâ facie, if a deciding officer considers documents containing material statements and not mere matters of form or repetitions of what is already substantially and fully known to the appellant, he should give the appellant the opportunity of dealing with them before he decides the appeal. The Board's case, however, is that in treating the inspector's reports as confidential it followed an old and well-known practice. I make no doubt that it did so for reasons which it honestly deemed sufficient, some of which it is easy to surmise and to appreciate. As the inspector does not perform any judicial function in reporting, the privilege which he could claim for his statements, if sued for libel, would be a qualified privilege only and not absolute. If the appellant, and I suppose the local authority, are ultimately to see it, the inspector might hesitate to express himself in his report as frankly as might be desirable for the guidance of the Board. But, in addition to practice, the Board relies on the language of the statute, as warranting this practice when truly construed.

Accordingly, two questions arise: What is the true construction of the statute? and, if the statute itself does not authorise the practice, is it, as part of the procedure adopted by the Board, so "contrary to natural justice" as to vitiate the decision? On both questions reference to the position before 1909 may be useful. Though inquiries in connection with judicial proceedings of more or less legal character were common enough before 1909, the legislature had not adopted any settled rule with regard to the reports. Sometimes it directed communication of the report to certain persons interested; sometimes it contemplated publication without expressly directing it; sometimes the Act was silent on the subject altogether. I have not found any instance in which in terms the legislature has directed that the report should not be disclosed at all. The Regulation of Railways Act, 1871, by s. 7 (2), directs that inquiries under that Act shall be held "in open court," and, by s. 7 (4), that the Board of Trade "shall cause any such report to be made public in such manner as they think expedient." The Merchant Shipping Act, 1894, consolidating earlier legislation, and the Shipping Casualties Rules made thereunder, which, by s. 479, have the force of statute, provided that the wreck commissioner or the magistrate holding a formal investigation into a shipping casualty should make a report of the proceedings and decision to the Board of Trade, and then r. 18 provided that, when a certificate of a master, mate, or engineer had been cancelled or suspended, the Board of Trade should, on application by any party to the proceedings, give him a copy of the report, while r. 20 (b) contemplates that the report will, as a matter of course, be "issued in print in London by the Board of Trade," in this, no doubt, recognising its existing practice. On the other hand, when a receiver of wreck takes an examination of witnesses on oath under s. 517 (2) and transmits it to the Board of Trade, he is directed to send a copy to Lloyd's for publication there, "and these," says MR. MURTON (WRECK ENQUIRIES, Edn. 1884, p. 38), "are the only depositions on wrecks made public documents." The Workmen's Compensation Act, 1906, sched. 2, r. 15 [repealed by National Insurance (Industrial Injuries) Act, 1946], enables an arbitrator to

refer to controverted questions as to the applicant's actual condition to a medical referee for inquiry and report, but the Act makes no provision as to the use which is to be made of the report. Regulation 28, made under the Act, directs that it is to be sent to the registrar, and is to be in a form which, as a form, is adapted only to communication to him as an officer of the county court. The decisions on the Workmen's Compensation Act carry the matter no further. The Licensing Consolidation Act, 1910, s. 19, and r. 16 made thereunder, provided that parties interested should be entitled to copies of the report made by licensing justices to the compensation authority on payment of a fee [but see now Licensing Act, 1953, s. 15 (2)]. The Criminal Appeal Act, 1907, by s. 8, requires that the trial judge shall be asked to report to the Court of Criminal Appeal upon the case which had been tried before him, for use upon the hearing of the appeal from him to the Court of Criminal Appeal, and by No. 15 (b) of the rules, which have statutory force, it is in the discretion of the court to grant or refuse communication of his report to other persons than to the court itself. By s. 9 (d) the Act further gave power to the Court of Criminal Appeal to depute to special commissioners inquiries involving prolonged examination of accounts, and here again the part to be taken in such inquiry by the appellant and even his presence at it are, by r. 41, in the court's discretion, as is also the communication to him of the special commissioner's report, when made. Further, apart from statute or statutory rules a decision of this court has settled the rule with regard to the Trinity Brethren, who sit as assessors with the judges of the Admiralty Division. The appellant was held not to be entitled to be informed of the answers given by them to the judge's questions: *The Banshee* (4); though in practice the judge very frequently saw fit to mention the gist of them in pronouncing his judgment, without being bound to do so. It is true that in none of these cases is there a close analogy to the present case, but I do not think that important. The analogies are imperfect, but all analogies are. Whether a report be about matter of fact or matter of opinion, whether, if opinion, it is expert opinion or lay, whether the subject involved is personal liberty or real property, whether the maker or the recipient of a report is or is not a judge, one thing is clear—that every one of these cases is a case of a judicial proceeding. Two conclusions may, I think, be drawn from them. It cannot be assumed that the legislature means all such reports to be communicated to those interested, where it does not say the contrary; indeed, if anything, its practice is the other way—namely, to specify how and to whom such reports are to be communicated, when they are intended to be communicated at all. Further, neither in the view of the legislature nor in that of the Court of Criminal Appeal is it, per se, contrary to natural justice and necessarily a fatal blot on judicial proceedings to withhold from an appellant cognisance of a statement made to the appellate tribunal only. In requiring that in a certain event the Local Government Board should hold a public inquiry, the legislature was requiring resort to a proceeding quite well known and in common use, to which was incident the Board's practice to treat the reports made thereon as confidential. The practice is stated in LUMLEY'S PUBLIC HEALTH ACT (7th Edn.), p. 636, and it was commented on, unfavourably but without effect, by FARWELL, J., in *A.-G.* v. *Nottingham Corpn.* (5). It was enacted, by s. 76 of the Act of 1909, that the Act should be construed as one with the Act of 1890, an Act under which this practice had prevailed. I think it is a sound inference, to be drawn as a matter of construction, that the legislature, aware, as I take it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry, which it prescribed, should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board would treat the report as confidential.

An argument has been presented to us on the word "public." A "local inquiry" was well known—a "public local inquiry" is admittedly a new expression as such, though the Merchant Shipping Act, 1894, s. 466 (12), required formal investigations into shipping casualties to be held in a "public building," and the Regulation of

Railways Act, 1871, provided that proceedings under it should be held "in open court." The idea of publicity in connection with a local inquiry was, therefore, not new even if the adjective "public" was. I do not see why the publicity of the inquiry should of itself involve the publication of the report, though the decision, where there is one, no doubt must be published more or less ex vi termini. The analogy of public documents does not advance the argument. "Public documents" are well known in the law of evidence, but the expression there means documents which may be proved without production of the originals, or else documents which, for reasons of State, are not to be produced and proved at all. I think that the natural import of the word "public," as qualifying the local inquiry, is to show that the public ought to be admitted to it as of right, because of its interest in such matters, although it is true that the subject-matter of the inquiry is private property, and the decision directly affects only private rights. As a matter of construction I think that the word "public," limited, as it is, to the local inquiry, negatives by implication the publicity of any of the later machinery. Such a conclusion is in harmony with the previous practice of legislation, so far as it went, for that was to provide for publication of reports expressly, where publication was intended, and also with the structure of the Act of 1909 itself. The Local Government Board was left to frame its own procedure. As must have been foreseen, it followed its own precedents, and made no provision for communicating this report under its rules, such as was made, in greater or less measure, in the rules under the Merchant Shipping Act, 1894, and the Licensing (Consolidation) Act, 1910, carrying out the provisions of these statutes. Furthermore, in committing the decisions of these appeals to a composite administrative Board, which must act by officers and cannot be ubiquitous, the legislature departed slightly, but significantly, from the language of prior enactments. The Local Government Board now "holds the inquiry" and not merely "causes it to be held." Being impersonal and corporate, it inquires by one organ and decides by another. The knowledge of the deciding officer as to the result of the inquiring officer's performance of his functions may well be an internal matter, never communicated to any stranger. No one contends that it is any part of the inspector's duty to decide anything. In this, as in other government Departments, an inspector whether regularly or specially employed, merely inquires and reports. His conclusions of fact, if he thinks fit to submit any, bind no one; they are simply stated for the information of the superior officials of the Department. From beginning to end, the appeal is one continuous Departmental exercise of corporate functions. It nowhere involves the communication to the appellant of internal reports, any more than it involves the exposition of the deciding officer's mental processes in arriving at his decision. I have come to the conclusion that the practice of treating the report as confidential has the authority of the Act of 1909. There is nothing in prior legislation to negative it—there is good ground in the adoption of the existing machinery of local inquiries for supposing it; there is support for this supposition in the language of the enactment, and it is sufficient in the absence of anything whatever in that language to the contrary.

So much for the question of construction, but, if I am wrong in this, still, as the Act and rules clearly cannot be construed to require in terms what the appellant contends for, how does the matter stand at common law in view of the decisions of the courts? What standard of natural justice has been recognised in judicial proceedings? Does it require the procedure now contended for? But little guidance is to be got from cases of writs of certiorari to inferior courts. In *Ex parte Evans* (6) Lord Denman held that the control which quarter sessions, like other judicial bodies, ought to exercise over its own procedure extended to making a rule giving the Bar exclusive audience at sessions, wherever four or more barristers attended. In *R.* v. *Ingham* (7) a rule nisi for certiorari to bring up a coroner's inquisition was refused so far as the ground relied on was the admission of unsworn testimony. I may be wrong in referring to cases on foreign judgments, for the counsel engaged in this case have not thought it germane to do so, but, as

A the expression "contrary to natural justice" has frequently been before the courts in that connection, I have thought it right to see what import has been given to it there before putting upon it an application of my own. It has often been pointed out that the expression is sadly lacking in precision. At one time it was regarded as setting up for foreign jurisdictions a standard of judicial correctness upon the pattern of our own common law courts, but times have changed. In *Buchanan* v.
B *Rucker* (8) LORD ELLENBOROUGH at nisi prius declared that the practice of the law courts of Tobago to summon a defendant, who was out of the jurisdiction and never had been within it, by nailing the writ on the door of the courthouse "is contrary to the first principles of reason and justice . . . it is mala praxis, and cannot be sanctioned." Nevertheless, this weighty opinion, which having regard to the circumstances seems, I must say, to be very temperately expressed, was
C coldly dismissed as "declamation" by the Court of Queen's Bench in *Schibsby* v. *Westenholz* (9), and, following the judgment of BLACKBURN, J., in that case, the best text-writers on private international law regard the expression "contrary to natural justice," when applied to the procedure of foreign courts, as being no more than a test by which to decide whether the foreign court was a court of competent jurisdiction or not, whether it had so summoned the defendant before it as to give
D it the right, in the eyes of English courts, to proceed in its own way to pass subsequent judgment upon him. The defence that the foreign judgment is contrary to natural justice is now "narrowed down to the question of assumption of jurisdiction over absent defendants": PIGOTT, FOREIGN JUDGMENTS (2nd Edn.), p. 171; and see DICEY, CONFLICT OF LAWS, p. 409; FOOTE, PRIVATE INTERNATIONAL JURISPRUDENCE (2nd Edn.), p. 558. The most complete judicial indications that I can
E find of the meaning of this vague expression are two: First, that of MELLISH, L.J., in *Ochsenbein* v. *Papelier* (10) (8 Ch. App. at p. 700),

> "it was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or want of jurisdiction, or that the judgment was fraudulently
F obtained."

Secondly, that of BRAMWELL, B., in *Crawley* v. *Isaacs* (11) (16 L.T. at p. 531),

> "the term natural justice, which has been referred to in reference to foreign judgments, refers rather to the form of the procedure than to the merits of the case . . . if the proceedings be in accordance with the practice of the foreign
G court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them."

How, then, stand the decisions upon this question of the relation to natural justice of the procedure of foreign courts? The following three cases are significant of the reserve with which our law now affixes this censure to procedure not its own. In *Messina* v. *Petrococchino* (12) the Privy Council decided that a judgment of
H the Greek Royal Commercial Chancery at Constantinople was rightly enforced as a foreign judgment by the Court of Appeal at Malta, and was not impeachable as being "wanting in the conditions of natural justice," although, under the procedure of that court, "without communication or attempt at communication with" the cargo-owner at Malta, and not on account of the condition of the cargo, but because the carrying ship was disabled from proceeding at Malta, the judgment had
I appointed a stranger to be curator of the cargo, and had directed him to borrow money on the security of it by "bottomry bond" for the payment as particular average of the cost of transhipping and forwarding, including the curator's own commission. In *Dent* v. *Smith* (13), when it was contended that all parties were bound by a judgment of the Russian Consular Court at Constantinople, the Court of Queen's Bench so held, declaring that it had "nothing to do" with the defendant's objection that, Russian maritime law being in question, the court had allowed it to be proved by French advocates, because French and Russian law in such matters is almost the same, and because only French advocates were then

resident in Constantinople, and no Russian advocate was to be had. In *Boissière & Co.* v. *Brockner & Co.* (14) CAVE, J., stigmatised as "empty declamation" an objection to the procedure of the Court of Appeal at Rouen, whose judgment he decided to enforce, though the objection was no less than that the court, having given judgment on the questions of principle, appointed the plaintiff's solicitor as referee to settle the accounts between the parties on the basis laid down in the judgment and to report the result to the court, a report which naturally the court adopted.

I cannot but feel deeply impressed by these object-lessons in toleration with regard to the procedure of other tribunals. I cannot but feel that all that can be urged against the Local Government Board might be still more forcibly urged against the Court of Criminal Appeal. Though in the long run I must decide for myself, I cannot but be impressed by the unanimous decision of the Divisional Court in the present case. The decisions which I have cited show that acts done in judicial proceedings, various in form, but all obnoxious to the same kind of objection as is urged here, and all contrary to a first impression of natural, if that means ideal, justice, have still been regarded as entirely consistent with our law. There is no place here for a phrase which was used in argument—namely, the appellant's "common law right" to stand before his judge. There is no question here of rights attaching at common law to common law courts. The Local Government Board here is a statutory tribunal, anomalous as compared with common law courts, created by the legislature for a special class of appeals and endowed by it with the power of formulating its own procedure. We must assume that a Department which the legislature has trusted will be worthy of the trust. The judgment of such a tribunal, regular on its face, is surely entitled to as much credit as that of a foreign court. The observations—made in the cases most cognate—point in the same direction. What is said by FIELD, J., in *Parsons* v. *Lakenheath School Board* (15) is very inconclusive. The language of LORD O'BRIEN, C.J., and MADDEN and WRIGHT, JJ., in *R.* v. *Local Government Board for Ireland* (16) is strong to show that the procedure of such a tribunal as this must necessarily be judged by standards different from those of ordinary courts. I think that just reliance was placed on that case by the learned judges in the Divisional Court. LORD LOREBURN'S words in *Board of Education* v. *Rice* (1) seem to me to be much in point. The Board must "act in good faith and fairly listen to both sides." I think the Local Government Board has done so in the present case. Who is to listen, and who is to be "heard," and when, and how, and how long is matter of procedure to be determined by the Board itself. LORD LOREBURN continues: "I do not think they are bound to treat such a question as if it were a trial." The same is true here. I know it is said that the question in the case of *Rice* (1) was "departmental," whatever that may mean, but in any case that is no sufficient distinction. The question there must have necessarily been deemed to involve a judicial decision, and not merely a ministerial or administrative act, otherwise proceedings by way of certiorari could not have been obtained at all. I fail to see how managers of a non-provided school, as such, can be put off with a less measure of just procedure than is to be meted out to the leaseholder of a house which is unfit for human habitation. LORD LOREBURN'S third requirement—"giving a fair opportunity to those who are parties in the controversy for contradicting or correcting any relevant statements prejudicial to their view"—has, in my opinion, been amply satisfied here. The canon does not involve that the appellant shall enjoy a formal general reply. The appellant had heard the case against him put at its highest by the witnesses at the inquiry. He had enjoyed, as the Act meant him to enjoy, on that occasion the opportunity of "contradicting or correcting" it. The most that he can say of the inspector's report is that he has never known whether the inspector agreed with his adversaries in toto or differed from them to some extent, but he knew the worst that could be said against him, and had contradicted it as far as he could. The inspector's report could not state it any worse for him.

A We are bound to remember that this is an appeal upon a concrete case, and we cannot decide it upon any abstract principle or upon any assumption beyond the facts of the case itself. The issue on this appeal was excessively simple. The only difficulty was to make out what the appellant could have to say for himself. The question of the propriety of the closing order had been concluded against him. It must be deemed to have been rightly made, for the purpose of this appeal B against the local authority's refusal to determine it. I assume, for the purposes of this case, both the good faith and the reasonableness of the appellant, but he made it quite plain on the inquiry that his case was that the closing order ought never to have been made. He had done nothing to cure the alleged dampness of the house—he said that it was not damp. He, therefore, enjoyed at the inquiry the fullest opportunity of knowing what he had to meet and of meeting it. The C inspector's report could not be really material to the conduct of his appeal, and, if the deciding officer was wrong, as I think he was not, in considering the reports without first communicating them to the appellant and hearing him upon them, the error was unsubstantial and could not reasonably affect his decision. In the language of Ord. 39, r. 6, no "substantial wrong or miscarriage has been thereby occasioned."

D That the jurisdiction of the High Court to quash the proceedings of inferior courts is most important, and that its exercise is most wholesome I fully agree. That the jurisdiction should be no less vigilantly exercised in the case of an administrative Department than in the case of justices I also agree. If it was our function to advise the Local Government Board as to its procedure generally, or to criticise the procedure actually adopted as such, I should for my part suggest that the E more open the procedure is the better. By all means let both the appellant and the local authority see the inspector's reports; a discreet and careful officer is not likely to offend, and if, in spite of discretion and care, he is harassed by actions for libel, he may well be defended and indemnified by his Department. By all means let the appellant, and the local authority too if it wishes, see and address the judge; it is all in his day's work. By all means let the appellant have the last F word, and as many of them in reason as he likes. Time spent in removing a grievance, or in avoiding the sense of it, is time well spent, and the Board's officials will, like good judges, amplify their jurisdiction by rooting it in the public confidence. But I am neither the adviser nor the critic of the Local Government Board. For myself, I have no fault whatever to find with the manner in which the Board has stated the facts to us, and has presented for our consideration the G views which it adopts, and the grounds on which it adopts them. The question is: "Did the Divisional Court rightly discharge the rule nisi in this case?" The grant or refusal of a rule absolute for a certiorari is always a matter of judicial discretion and, guiding myself by the prescriptions of the legislature and the decisions of the court, I am of opinion that the discharge of the rule nisi was right, and that the appeal should be dismissed.

H *Rule absolute.*

Solicitors: *Rubinstein, Nash & Co.*; *Sharpe, Pritchard & Co.*; *A. P. Johnson.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

A

GUARANTY TRUST CO. OF NEW YORK *v.* HANNAY & CO.

[COURT OF APPEAL (Buckley, Pickford and Bankes, L.JJ.), February 8, 9, March 11, 1915]

[Reported [1915] 2 K.B. 536; 84 L.J.K.B. 1465; 113 L.T. 98; 21 Com. Cas. 67]

B

Declaratory Judgment—Declaration in absence of other cause of action—Claimant interested in subject-matter of declaration—Declaration that claimant not liable in existing or possible action.

R.S.C., Ord. 25, r. 5, which provides: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not," is not invalid as being ultra vires the Rules Committee. The rule confers on the court a general power to make a declaration in favour of a party although that party has no cause of action apart from the rule, provided that he is interested in the subject-matter of the declaration. The power is not limited to making a declaration at the instance of a person claiming a right and intending to assert it if it should become necessary. A declaration that a person is not liable in an existing or possible action is one that will hardly ever be made. In practically every case the person asking for it will be left to make his defence in the action when it is brought, but it is not beyond the power of the court in a very exceptional case to make such a declaration. Having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors, the rule should receive as liberal a construction as possible.

C D E

So **held** by PICKFORD and BANKES, L.JJ., BUCKLEY, L.J., dissenting.

Notes. Applied: *British Association of Glass Bottle Manufacturers* v. *Forster* (1917), 86 L.J.Ch. 489. Considered: *Re Clay, Clay* v. *Booth*, [1918–19] All E.R.Rep. 94; *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616. Applied: *Barwick* v. *South Eastern and Chatham Rail. Co.*, [1921] 1 K.B. 187. Followed: *Hanson* v. *Radcliffe U.D.C.*, [1922] 2 Ch. 490. Considered: *Ruislip-Northwood U.D.C.* v. *Lee* (1931), 145 L.T. 208; *Odhams Press, Ltd.* v. *London and Provincial Sporting News Agency (1929), Ltd.*, [1936] 1 All E.R. 217. Applied: *Re Lewis' Declaration of Trust, Lewis* v. *Lewis, Lewis* v. *Ryder*, [1953] 1 All E.R. 1005. Referred to: *Re Staples, Owen* v. *Owen*, [1916] 1 Ch. 322; *Rio Tinto Co., Ltd.* v. *Ertel Bieber & Co., Same* v. *Vereimingte Konigs und Laurahutte Act., Same* v. *Dynamit Act.* (1917), 116 L.T. 810; *Thompson* v. *Amis*, [1917] 2 Ch. 211; *Bombay and Persia Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402; *Markwald* v. *A.-G.*, [1920] 1 Ch. 348; *R.* v. *Cheshire County Court Judge, Ex parte Malone*, [1921] All E.R.Rep. 344; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*, [1921] All E.R.Rep. 329; *Prosperity, Ltd.* v. *Lloyds Bank, Ltd.* (1923), 39 T.L.R. 372; *Jaeger* v. *Jaeger Co.* (1927), 44 R.P.C. 437; *Jacobs* v. *Aveling-Barford, Ltd.*, [1936] 1 All E.R. 297; *Stockwell* v. *Southgate Corpn.*, [1936] 2 All E.R. 1343; *Cooper* v. *Wilson*, [1937] 2 All E.R. 726; *Prince De Bearn* v. *La Compagnie D'Assurances La Federale De Zurich* (1937), 42 Com. Cas. 189; *Har-Shefi* v. *Har Shefi*, [1953] 1 All E.R. 783.

F G H I

As to declaratory judgments, see 22 HALSBURY'S LAWS (3rd Edn.) 746–751; and for cases see 30 DIGEST (Repl.) 165 et seq.

Cases referred to:

(1) *Barraclough* v. *Brown*, [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249, H.L.; 30 Digest (Repl.) 175, *243*.

(2) *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242; 62 L.J.Ch. 294; 67 L.T. 238; 8 T.L.R. 717; 7 Asp.M.L.C. 195; 2 R. 23, C.A.; 30 Digest (Repl.) 172, *229*.

(3) *The Manar*, [1903] P. 95; 72 L.J.P. 41; 89 L.T. 26; 51 W.R. 687; 9 Asp.M.L.C. 420; 30 Digest (Repl.) 179, *272*.

(4) *Williams* v. *North's Navigation Collieries, Ltd.*, [1904] 2 K.B. 44; 73 L.J.K.B. 575; 91 L.T. 3; 68 J.P. 371; 52 W.R. 564; 20 T.L.R. 448, C.A.; on appeal, [1906] A.C. 136; 75 L.J.K.B. 334; 94 L.T. 447; 70 J.P. 217; 54 W.R. 485; 22 T.L.R. 372; 50 Sol. Jo. 343, H.L.; 30 Digest (Repl.) 173, *237*.

(5) *Chapman* v. *Michaelson*, [1908] 2 Ch. 612; 78 L.J.Ch. 272; 100 L.T. 109; 24 T.L.R. 795; affirmed, [1909] 1 Ch. 238; 78 L.J.Ch. 272; 100 L.T. 109; 25 T.L.R. 101, C.A.; 30 Digest (Repl.) 173, *231*.

(6) *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.*, [1906] 1 Ch. 324; 75 L.J.Ch. 178; 94 L.T. 56; 54 W.R. 370; 22 T.L.R. 178; affirmed, [1906] 2 Ch. 498; 75 L.J.Ch. 720; 95 L.T. 178; 22 T.L.R. 724; 50 Sol. Jo. 650, C.A.; 30 Digest (Repl.) 169, *201*.

(7) *Offin* v. *Rochford R.D.C.*, [1906] 1 Ch. 342; 75 L.J.Ch. 348; 94 L.T. 669; 70 J.P. 97; 54 W.R. 244; 50 Sol. Jo. 157; 4 L.G.R. 595; 30 Digest (Repl.) 173, *236*.

(8) *Burghes* v. *A.-G.*, [1911] 2 Ch. 139; 80 L.J.Ch. 506; 105 L.T. 193; 27 T.L.R. 433; 55 Sol. Jo. 520; affirmed, [1912] 1 Ch. 173; 81 L.J.Ch. 105; 105 L.T. 758; 28 T.L.R. 72; 30 Digest (Repl.) 169, *210*.

(9) *Jenkins* v. *Price*, [1907] 2 Ch. 229; 76 L.J.Ch. 507; 23 T.L.R. 608; on appeal, [1908] 1 Ch. 10, C.A.; 30 Digest (Repl.) 174, *238*.

(10) *Dyson* v. *A.-G.*, [1911] 1 K.B. 410; 80 L.J.K.B. 531; 103 L.T. 707; 27 T.L.R. 143; 55 Sol. Jo. 168, C.A.; subsequent proceedings, [1912] 1 Ch. 158; 81 L.J.K.B. 217; 105 L.T. 753; sub nom. *Dyson* v. *A.-G.*, Burghes v. *A.-G.*, 28 T.L.R. 72, C.A.; 30 Digest (Repl.) 168, *193*, *194*.

(11) *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (1904), 9 Com. Cas. 289; 30 Digest (Repl.) 178, *265*.

(12) *Lofthouse Colliery, Ltd.* v. *Ogden*, [1913] 3 K.B. 120; 82 L.J.K.B. 910; 107 L.T. 827; 29 T.L.R. 179; 57 Sol. Jo. 186; 30 Digest (Repl.) 179, *270*.

(13) *Cox* v. *Barker*, *Barker* v. *Cox* (1876), 3 Ch.D. 359; 35 L.T. 685; 2 Char. Pr. Cas. 265, C.A.; 30 Digest (Repl.) 166, *176*.

(14) *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. 494; 68 L.J.Ch. 289; 80 L.T. 332; 47 W.R. 385; 15 T.L.R. 202; 43 Sol. Jo. 258, C.A.; affirmed sub nom. *Duke of Bedford* v. *Ellis*, [1901] A.C. 1; 70 L.J.Ch. 102; 83 L.T. 686; 17 T.L.R. 139, H.L.; 30 Digest (Repl.) 489, *3718*.

(15) *Brooking* v. *Maudslay, Son and Field* (1888), 38 Ch. 636; 57 L.J.Ch. 1001; 58 L.T. 852; 36 W.R. 664; 4 T.L.R. 421; 6 Asp.M.L.C. 296; 30 Digest (Repl.) 172, *223*.

(16) *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (1885), 30 Ch.D. 387; 55 L.J.Ch. 744; 52 L.T. 839; 34 W.R. 217; 1 T.L.R. 641, C.A.; 1 Digest 36, *283*.

(17) *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141; 75 L.J.K.B. 218; 94 L.T. 153; 54 W.R. 270; 22 T.L.R. 187, C.A.; 11 Digest (Repl.) 542, *1508*.

(18) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602; 63 L.J.Q.B. 70; 69 L.T. 604; 10 T.L.R. 7; 37 Sol. Jo. 756; 6 R. 1, H.L.; 11 Digest (Repl.) 371, *374*.

(19) *Rooke* v. *Lord Kensington* (1856), 2 K. & J. 753; 25 L.J.Ch. 795; 28 L.T.O.S. 62; 4 W.R. 829; 69 E.R. 986; 30 Digest (Repl.) 166, *178*.

(20) *Evans* v. *Levy*, [1910] 1 Ch. 452; 79 L.J.Ch. 383; 102 L.T. 128; 30 Digest (Repl.) 173, *232*.

(21) *Jenner* v. *Jenner* (1866), L.R. 1 Eq. 361; 35 L.J.Ch. 329; 12 Jur.N.S. 138; 14 W.R. 305; 17 Digest (Repl.) 376, *1823*.

(22) *Bushby* v. *Munday* (1821), 5 Madd. 297; 56 E.R. 908; 11 Digest (Repl.) 547, *1548.*

(23) *Hyman* v. *Helm* (1883), 24 Ch.D. 531; 49 L.T. 376; 32 W.R. 258, C.A.; 11 Digest (Repl.) 547, *1545.*

(24) *Re Connolly Bros., Ltd., Wood* v. *Connolly Bros., Ltd.*, [1911] 1 Ch. 731; 80 L.J.Ch. 409; sub nom. *Re Conolly Bros., Ltd., Wood* v. *Conolly Bros., Ltd.*, 104 L.T. 693, C.A.; 16 Digest 196, *1014.*

Also referred to in argument:

Zinc Corpn., Ltd. & Romaine v. *Skipwith* (1914), 31 T.L.R. 107, C.A.; 30 Digest (Repl.) 179, *267.*

Hope v. *Hope* (1854), 4 De G.M. & G. 328; 2 Eq. Rep. 1047; 23 L.J.Ch. 682; 23 L.T.O.S. 198; 2 W.R. 545; 43 E.R. 328, L.C.; 2 Digest (Repl.) 198, *182.*

Re Mills' Estate, Ex parte Works and Public Buildings Comrs. (1886), 34 Ch.D. 24; 56 L.J.Ch. 60; 55 L.T. 465; 51 J.P. 151; 35 W.R. 65; 3 T.L.R. 61, C.A.; 11 Digest (Repl.) 267, *1518.*

Appeal by defendants from an order of BAILHACHE, J., on a summons in the Commercial Court.

The defendants were cotton dealers carrying on business in Liverpool, and in the years 1909 and 1910 they made purchases of cotton from a firm in the United States. The course of business with regard to such transactions was for the sellers upon shipment of the cotton to draw a bill of exchange for the price of the cotton, to affix thereto the bills of lading and insurance certificate, and to transmit the documents to the defendants so that they might accept the bill of exchange and pay the amount thereof. A number of bills of exchange so accepted were purchased in good faith by the plaintiffs, a company carrying on business in New York and having a branch in London, and were presented by them with the accompanying documents to the defendants, who accepted and paid the same. It subsequently appeared that the bills of lading attached were forgeries, being for cotton which never had any existence and which had never been shipped. In January, 1911, the defendants commenced an action against the plaintiffs in the United States, claiming repayment of the amount of the bills of exchange, their claim being based on grounds depending mainly upon English law, and they recovered judgment. The plaintiffs appealed, and a new trial was ordered. The plaintiffs then brought the present action in England, claiming declarations that they had not, by presenting the bills for acceptance with the bills of lading attached, warranted or represented that the bills of lading were genuine, but that all the bills of exchange had been accepted by the defendants unconditionally, so that they were not bound to repay the amounts of the bills. Upon an application by the defendants to strike out, under R.S.C., Ord. 25, r. 4, the claim for the declarations on the ground that they disclosed no cause of action, BAILHACHE, J., in giving judgment, said: The practice in the Commercial Court has been to make declarations when they serve some real practical purpose, such, for instance, as guiding parties in their future conduct in relation to commercial contracts, and with a view rather to avoid litigation than in aid of it. I am not prepared to hold that declarations can only be made at the instance of the party for the purposes of an action in which he proposes to be plaintiff. BUCKNILL, J., in the circumstances not distinguishable in principle from those of the present case, made such a declaration as I am asked to make in *The Manar* (3), and, in my judgment, it is open to the courts to entertain the plaintiff's action if they see fit. The power is discretionary, but I think it exists. The next question is: Ought it to be exercised in this case? The advantages of the course taken by the plaintiffs are obvious. There will be a decision of the English court upon the precise point instead of the conflicting opinions of English lawyers. Of course, the decision will not be binding upon the American courts, but it will afford them the best procurable evidence, and I see no reason to doubt that they will welcome the assistance which such a decision would give. I shall follow the precedent of *The Manar* (3) and entertain the action.

A Accordingly, he dismissed the application, and the defendants appealed.

Greer, K.C., and *A. R. Kennedy* for the defendants.

Duke, K.C., and *D. M. Hogg* for the plaintiffs.

Cur. adv. vult.

Mar. 11, 1915. The following judgments were read.

B **BUCKLEY, L.J.**—In the course of the discussion in this court the defendants have limited themselves to asking that, from the endorsement on the writ, there should be struck out the three declarations therein contained, leaving paras. 4, 5 and 6, which ask for injunctions and payment of costs, as being, as in fact they are, a separate matter. The declarations do not lead to, and have no bearing upon, the injunctions. If the declarations, if granted, would lead to or bear upon the C injunctions, my conclusion of this appeal would be different. But the fact is that they do not.

The question to be decided is whether a plaintiff can have a declaration in respect of a cause of action residing in the defendant, and not in the plaintiff, or, in other words, whether a plaintiff who is under an obligation can, as against a defendant to whom he owes its performance, have a declaration delimiting the obligation. D To put a concrete case, exhibiting the matter in what may be thought an extravagant form: Will an action lie by a plaintiff, who, upon allegations that he is indebted to the defendant for goods sold and delivered and that the goods are not according to sample, claims a declaration to that effect, and a declaration that he is liable, not for the contract price, but for some smaller sum?

In my opinion, an action in such a case will not lie. Such a declaration at the E instance of such a plaintiff is impossible. An action is a legal proceeding in which a plaintiff claims against a defendant or against a fund enforcement of some obligation towards the plaintiff binding the defendant or the fund. The plaintiff must allege facts which, if true, give rise, as matter of law, to such an obligation. Such alleged facts constitute a cause of action. In the absence of such alleged facts, in other words, if there is no cause of action alleged, an action will not lie. F Before the Judicature Acts it was familiar that a plaintiff in the Court of Chancery often alleged in his bill imaginary facts with a view to interrogating upon them, and seeing whether he had a case or not, knowing full well that, if he did not allege facts which raised a cause of action, his proceeding would come to an abrupt end on demurrer. An injunction is a remedy which the court applies under proper circumstances to enforce an obligation. A declaration is a pronouncement of the G court upon the construction of a document, on which an alleged obligation towards the plaintiff depends, or delimiting the obligation as existing in point of law. A declaration and an injunction are but the means of obtaining the definition of an obligation, or the enforcement in certain circumstances of an obligation, if upon the alleged facts an obligation towards the plaintiff arises as matter of law. Neither declaration nor injunction nor relief is, in my judgment, within the jurisdiction of H the court unless it be founded upon alleged facts showing (if true) a cause of action. If such facts are alleged, but are not proved, the court may of course make a declaration or express an opinion disclosing the ground on which the action fails, and may thereupon dismiss it. The concluding words of R.S.C., Ord. 25, r. 5, are capable of being read as empowering the court to make declarations where relief could not be claimed. The language of the Court of Chancery Procedure Act, I 1852, s. 50 [repealed], was:

> "No suit . . . shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

The final words of Ord. 25, r. 5, are: "Whether any consequential relief is or could be claimed, or not." But it is impossible, I think, to read the words of the rule as giving the court power to make a declaration where there is no cause

of action. If that were its effect, this part of the rule would be ultra vires. If there is no cause of action, there is, in my opinion, no jurisdiction. A rule cannot create jurisdiction. The rule is only one of procedure: per LORD DAVEY in *Barraclough* v. *Brown* (1) ([1897] A.C. at p. 624). Further, the rule follows after Ord. 25, r. 4, which provides the means of getting rid of the proceeding in any case in which there was no reasonable cause of action. The action mentioned in r. 5 must, I think, be an action in which there is a cause of action, and which could not be got rid of under r. 4. The last words, though difficult, bear a meaning if they are understood to include cases in which consequential relief could not presently be given, as, for instance, where the declaration sought is as to future or reversionary rights, and are also intelligible if addressed to such a case as that which arose in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2), where the Peninsular and Oriental Co. alleged that they would, as customers of the defendants, be entitled to certain accommodation in the docks, and the defendants denied that right, and a declaration was obtained to quiet the matter, although an injunction was refused, because the plaintiffs had never sought to avail themselves of the right and lien denied. LORD DAVEY so understood the rule and in *Barraclough* v. *Brown* (1) used the following words ([1897] A.C. at p. 624):

> "It would obviously be incompetent for the judges or the Rule Committee under a power to make rules of procedure to give the court power to deal with a matter which is outside its jurisdiction. The rule relates to procedure only and must be so construed."

The jurisdiction was in that case by statute in another tribunal, but the principle of the words is generally applicable. Such a case as *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2) is analogous to a case in which a plaintiff sues for an injunction on the ground that the defendant threatens and intends to do something which the plaintiff says is contrary to some obligation binding on the defendant. The act may not yet have been done. There may be no right to relief by way of damages, but there may be a right to relief prospective in its nature, that is to say, to an injunction forbidding the defendant so to act as to involve the plaintiff in damages. Further, the declaration authorised by Ord. 25, r. 5, is a "declaration of right" that is of the plaintiff's right "whether any consequential relief is or could be claimed, or not." It does not authorise a declaration of obligation. Where the cause of action is in the defendant and not in the plaintiff the declaration which the plaintiff seeks is not a declaration of any right of his, but is a declaration that his obligation is not that which the defendant alleges.

In the case before the court, Hannay & Co. allege facts which show an obligation towards them binding the Guaranty Trust Co. of New York, and they are suing upon it in New York. Hannay & Co. have a cause of action and are seeking to enforce it in an appropriate jurisdiction. The Guaranty Trust Co., on the other hand, have no cause of action against Hannay & Co. They have brought an action in this country asking for a declaration as to the English law, which is material in the American proceedings, and asking for an injunction to restrain the further prosecution of proceedings in America. With the question whether upon proper allegations of fact there would be a cause of action for an injunction I need not concern myself, for the Guaranty Trust Co. do not ask upon the present application to strike out that part of the endorsement on the writ which asks for an injunction. The Guaranty Trust Co. say, and it is the fact, that Hannay & Co. could have sued them in this country, and that the English law could better be applied here than ascertained by evidence for application in America. In this I agree. In the course of the case I suggested that Hannay & Co. should sue here upon proper terms such as that the evidence already taken in America should be available here, and that all costs in America, including the costs in this appeal, should be costs in

A the English action. Hannay & Co. declined this, and they are not compellable to adopt the suggestion.

We have to deal with the action before us. In my opinion, no cause of action is disclosed. The declaration which the Guaranty Trust Co. ask for, if made, would be merely an expression of opinion by the court to which this court could give no effect whatever. There is no claim by the Guaranty Trust Co. against B Hannay & Co. with a view to the determination of which this court could declare, for there is no existent liability of Hannay & Co. towards the Guaranty Trust Co. As regards the declarations the action will not, in my opinion, lie. In asking for them the Guaranty Co. are in fact seeking to compel Hannay & Co. to litigate the cause of action which Hannay & Co. have against them in a forum to which Hannay & Co. are not bound and are not minded to resort.

C Numerous authorities have been referred to; some of them may be dismissed shortly. In *The Manar* (3) there was plainly a cause of action. The plaintiffs were mortgagees of a ship, the defendants were necessaries men. As between those parties arose a contest as to their rights against the ship. They were parties both interested in a property against which the plaintiffs claimed to enforce a right which they alleged. In *Williams* v. *North's Navigation Collieries, Ltd.* (4) the D plaintiffs were workmen claiming to recover sums which they alleged to have been improperly deducted from their wages and claiming a declaration that the deduction was illegal under the Truck Act, 1831. In *Chapman* v. *Michaelson* (5) the plaintiff was a trustee under a scheme of arrangement, and the defendant an unregistered moneylender who had taken a mortgage from the debtor. The plaintiff said that that security was bad by reason of the statute, and that the fund E coming to him was so much the larger in consequence. In *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6) the plaintiffs failed in obtaining a declaration of invalidity of letters patent because no legal right of the plaintiffs had been infringed. In *Offin* v. *Rochford R.D.C.* (7) the plaintiff failed in obtaining a declaration because, as the learned judge held, he had no cause of action. Whether he rightly so held or not I do not stay to inquire. If he had no cause of action, F then the learned judge's words, in my opinion, are right. He said ([1906] 1 Ch. at p. 358).

> "I think in order to justify an action there must still, as before that rule, be some cause of action; and all that the rule means is, that if there is a cause of action the plaintiff may ask, and the court may award, merely a declaration G asserting his right without awarding damages or an injunction or any other form of specific relief. But in order to justify an action there must be still, as before the rule, a cause of action."

I prefer this statement of the law to another by the same learned judge to the contrary effect, in *Burghes* v. *A.-G.* (8) ([1911] 2 Ch. at p. 155). The learned judge there failed to observe that *Jenkins* v. *Price* (9), to which he refers as an H example, was a case upon the construction of a document. Of this class of case I will say something presently. In *Williams* v. *North's Navigation Collieries, Ltd.* (4), COLLINS, M.R., said ([1904] 2 K.B. at p. 49):

> "We felt that there would be a difficulty in making the declarations which the plaintiffs asked for, even if we should be of opinion that such a set-off was I a violation of the statute, because, even on the view of the plaintiffs, who asked for it, the declaration would not be ancillary to the putting in suit of any legal right."

The reversal of the decision in the House of Lords does not affect the sentence which I have quoted.

The plaintiffs, Hannay & Co., principally relied upon the decision of the Court of Appeal in the *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2). It is, I think, no decision in their favour, but, on the contrary, is against them. The declaration there made was a declaration

that certain regulations of the defendants were not binding upon the plaintiffs. The plaintiffs were the Peninsular and Oriental Co. and another company, who had no interest and were upon that ground ignored. The Peninsular and Oriental Co. had never so required berths in the dock as that the regulations were a deprivation of their rights, and upon that ground the decision of the court below which had refused them an injunction was affirmed. LINDLEY, L.J.'s judgment dealing with this point concludes ([1892] 3 Ch. at p. 259) with the words "the order appealed from must therefore stand." His reasoning down to that point is addressed to leading to that conclusion. But then he goes on to express the reasons for which he considers that a declaration ought to be made, and he does so expressly upon the footing that there were rights of the Peninsular and Oriental Co. which could be ascertained and declared. Those rights arise in the following manner. The Peninsular and Oriental Co. never had in fact asked for unappropriated berths, but as customers of the docks they might do so. As the lord justice expresses it, they had rights in that respect, and it was in elucidation of those rights that the court went on to declare as to the regulations being binding or not binding upon the plaintiffs. KAY, L.J., says the same thing in still plainer terms. He says (ibid. at p. 273):

> "They may at any time require to use the docks for ships for which no berth is appropriated. I think that, without adding any other plaintiff, as the suit is now constituted, it is right that the court should declare to what extent these regulations are proper and can have any effect in law so far as the Peninsular and Oriental Co. are concerned."

That decision, therefore, in my opinion, is expressly to the effect that only if the plaintiff has rights in the matter in respect of which the declaration is sought can a declaration be made.

There is another decision in the Court of Appeal, *Dyson* v. *A.-G.* (10), which requires careful consideration. It is a case in which the plaintiff sued for a declaration that he was under no obligation to fill up Form 4 under the Finance (1909–10) Act, 1910. In other words, the plaintiff was alleging that he was not under any obligation, and asking for a declaration to that effect. But the action contained an allegation that the commissioners threatened to enforce penalties against him for failure to make the return. The plaintiff did not go on, I agree, to ask for an injunction based upon that threat, and it would have been a serious question whether an injunction could be obtained against the Crown. All that the court decided was that they would not strike out the pleading under Ord. 25, r. 4, as disclosing no reasonable cause of action, and that, on an interlocutory proceeding, they would not determine the question whether the action ought to be dismissed although, as the Master of the Rolls said, that might be the result at the trial. The judgment of the Master of the Rolls contains this significant sentence ([1911] 1 K.B. at p. 417):

> "I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be a plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The court may well say, 'Wait until you are attacked and then raise your defence,' and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial."

The action subsequently came on for trial.

The court adhered to the views expressed on the interlocutory application and made certain declarations. I note, however, three things. First, that both the Crown (see [1912] 1 Ch. at p. 161) and the plaintiff (see ibid. at p. 162) were asking for declarations; secondly, that the matter for decision was the construction of an Act of Parliament; and thirdly, that the plaintiff was threatened with penalties if

A he did not do certain acts which according to the defendant's construction of the Act he was bound to do. The question, therefore, was as to the construction of a document which bound the plaintiff, and upon which the defendant was threatening him with penalties if he did not act upon the footing that the construction was that which the defendant alleged. In both *Dyson* v. *A.-G.* (10) and *Burghes* v. *A.-G.* (8) the judges rely upon the threat of penalties as a material element: B see per COZENS-HARDY, M.R., [1912] 1 Ch. at p. 166; MOULTON, L.J., ibid. at p. 168; FARWELL, L.J., ibid. at pp. 172, 189. If ever there was a case in which the court would seek to find that it had jurisdiction this was one, and there was, I conceive, a cause of action in the plaintiff—namely, that of any one party to a document against the other parties to ascertain its true construction (this is the subject of Ord. 54A, r. 1)—and the claim to protection against proceedings for C penalties which, according to the plaintiff's construction, had not been incurred. I do not think the case is an authority for the proposition that a plaintiff who has no cause of action can obtain a declaration as to the law applicable to a case in which the defendant has a cause of action against him.

There are several cases (BANKES, L.J., has referred to some of them in the judgment to be presently delivered) in which declarations have been made as to D the construction of a document at the instance of some one of the parties to the document against the others. These cases, in my opinion, throw no light upon the question which arises in the present case. There is a cause of action as between parties who by personal contract or statutory obligation are bound towards each other, and it arises from their mutual obligations. There seems to be one case, and one only, in which a plaintiff obtained a declaration as to his obligation towards E the defendant. It is *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (11). I think that decision was wrong, for it was not a question of construction of a contract, but a question whether the plaintiffs were bound by a certain contract towards persons who were not parties to it. *Lofthouse Colliery, Ltd.* v. *Ogden* (12), rested as it was upon Ord. 25, r. 5, was also, I think, wrong. But it may be that that decision could have been supported under Ord. 54A, r. 1, F but for the principle of *Barraclough* v. *Brown* (1). It was a case in which the court was making a declaration in a matter in which the jurisdiction to give effect to the right declared rested not on the court, but on another tribunal. It was in this respect similar to *Barraclough* v. *Brown* (1), where the House of Lords held that the High Court could not make a declaration when the jurisdiction was by statute in a court of summary jurisdiction. In the present case the plaintiffs are G asking for a declaration as to their obligation towards the defendants. In my opinion, the court has no jurisdiction to make it. I think the appeal should be allowed, and the three declarations struck out from the endorsement on the writ.

PICKFORD, L.J.—In this case the plaintiffs sue the defendants for a declaration that the plaintiffs are not liable to the defendants in respect of money paid on H certain bills of exchange and for an injunction to restrain the defendants from suing the plaintiffs in any foreign court to recover such money. The ground of the alleged liability is not important. The defendants have sued the plaintiffs in the United States of America in respect of the money paid on one of the bills, and obtained judgment in the court of first instance. That judgment has, however, been set aside, and a new trial ordered, and the matter is now pending in the I courts of the United States of America. The injunction sought is to restrain the defendants from proceeding with that action or instituting any proceedings in respect of the other bills.

The matter comes before us in a peculiar, and, I think, most unsatisfactory, way, owing no doubt to the laudable wish of both sides to have a decision, or, at any rate, an opinion, of the court as soon as possible. The plaintiffs after the issue of the writ made an application for an interim injunction as claimed in paras. 4 and 5 of the writ. On the hearing of the application counsel for the defendants said that he intended to raise the question that the court has no

jurisdiction to make the declaration claimed in paras. 1 to 3 of the writ on the grounds, as stated by BAILHACHE, J., before whom the case came, that such declarations could only be made (i) as ancillary to putting some rights in the person asking for the declaration in suit or (ii) at the instance of a party who desires to use the declaration to support some right which he seeks to enforce. It seems to me clear that, even if the contention were right, it would not necessarily dispose of the claim for an injunction, for a person can be restrained from instituting or continuing proceedings in a foreign court if a proper case of injustice or oppression be made out without any declaration of right. However, I suppose that the parties were of opinion that this objection raised the substantial question between them, and it was agreed that the case should be argued as though the defendants had taken out a summons under Ord. 25, r. 4, to strike out the claim as disclosing no cause of action. The proceedings were, therefore, transformed from an application by the plaintiffs for an injunction under paras. 4 and 5 of the writ to an application by the defendants to strike out the claim, and in reality this was confined to striking out paras. 1 to 3, as it was admitted in argument before us that paras. 4 and 5 could not be struck out at this stage. I doubt if that proceeding was regular, as the endorsement on the writ is not a statement of claim, and, therefore, not a pleading, and none has been delivered. Nevertheless, it was heard by BAILHACHE, J., on that basis, and, after full argument, he dismissed the application under Ord. 25, r. 4, with costs. His order was:

> "On the application of the defendants that the claim of the above-named plaintiffs for a declaration and other relief claimed and endorsed on the writ herein be struck out, and that the action be stayed or dismissed, and judgment entered accordingly, pursuant to Ord. 25, r. 4, with costs, it is ordered that such application be dismissed, and that the costs thereof be costs in the cause."

Against that decision this appeal was brought, and, strictly speaking, the only question before us is whether the claim, so far as it asks for a declaration, should be struck out under Ord. 25, r. 4. I think the answer as to that is plain and clear—that is, that it should not, for that summary procedure is only to be applied in plain cases, and this is not one. This was the decision on a similar point in *Dyson* v. *A.-G.* (10). The case, however, was not argued before us on that ground only, but on the larger ground whether the objection made by the defendants to the power of the court to make declarations was sound, and the parties desired the opinion of the court on the larger question whether such a declaration can be made. It may be doubted whether such an opinion will be of any value, because a court before which this case came might well say that it was not necessary for the decision of the exact point before us, and, therefore, may be disregarded. The question really turns upon two matters: (i) Does Ord. 25, r. 5, mean that the court has power to make such a declaration as is here asked? (ii) If it has that meaning, is it ultra vires, as purporting to enlarge the jurisdiction of the court which cannot be done by a rule made by the rule committee? If such a meaning can be given to the rule, I think it should be given; to narrow it as asked by the defendants would be to put an end to what has been a most valuable procedure especially in commercial matters. I may instance one case, *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (11), in which questions involving most important matters, on which immediate action was required, were decided, which, apart from this rule, could only have been decided after great delay, inconvenience, and expense. Still, if the power be not validly conferred, it cannot be exercised.

The history of the matter is shortly that before 1852 the Court of Chancery would not give declaratory judgments unless at the same time it gave consequential relief. In that year the Court of Chancery Procedure Act was passed. [HIS LORDSHIP read s. 50 of that Act.] This was interpreted to mean that such a judgment could not be given unless consequential relief could also be given although in fact it was not. This may have been too narrow a construction, as suggested by JAMES, L.J., in *Cox* v. *Barker* (13), but it prevailed until 1883, when

A the present R.S.C., Ord. 25, r. 5, was passed. The first objection is that the rule only gives the right to a declaration as ancillary to putting some right in suit, or, as it is also expressed, a person can only ask for a declaration when he has a cause of action. This, of course, must mean a cause of action apart from the provisions of the rule. I think that, if this be the meaning, the rule has no effect whatever, for a declaration under those circumstances could be made before. I find that B FARWELL, L.J., said in *Chapman* v. *Michaelson* (5) ([1909] 1 Ch. at p. 243), quoting LINDLEY, M.R., in *Ellis* v. *Duke of Bedford* (14) ([1899] 1 Ch. at p. 514):

> "Moreover, now, under the Judicature Act, actions can be brought merely to declare rights, and this is an innovation of a very important kind."

He referred to Ord. 25, r. 5. If the defendants are right on this first point, it C is no innovation at all.

But I think the contention cannot be maintained either on principle or authority. If there be a cause of action apart from the rule, there must be also a consequential right to relief. The mere fact of being entitled to a right does not give a cause of action, which only arises when there is interference actual or threatened with the right, and in that case there is a right to relief in the first case by damages or D injunction, or both, possibly by specific performance, and in the latter by injunction. In such cases, therefore, consequential relief could be given whether it was or was not given, and the rule says the declaration may be made where consequential relief could not be given. It seems to me, therefore, that it cannot be confined to cases where there is a cause of action apart from the rule. It has been suggested that "could not" may be read "could not presently" or "at present," E but I do not think that such an interpretation is of any assistance, for, if there is a cause of action, there is a present right to relief, and if there is not a present right to relief, then there is not a cause of action. But, in my opinion, the point is covered by authority in this court in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2). That was an action to declare certain regulations made by the defendants invalid, and for an injunction F to restrain them from enforcing them. It is not necessary to notice the case of the first plaintiffs as they were held not entitled to maintain the action on grounds which do not touch the case. The Peninsular and Oriental Steam Navigation Co. were customers of the docks, and there were both appropriated and unappropriated berths; the Peninsular and Oriental Co., from the nature of their business, only used appropriated berths, but like any other shipowner it was possible that they G might some day want an unappropriated berth, and they in the first instance asked for an injunction in respect of both kinds of berths. In the course of the argument in the Court of Appeal the claim for an injunction was dropped. A. L. SMITH, J., dismissed the action with costs, which he could not have done if any cause of action had been made out, and the plaintiffs appealed. The Court of Appeal affirmed the decision dismissing the action, but made a declaration at the instance H of the Peninsular and Oriental Co. that the regulations as to unappropriated berths were invalid. I have examined the actual order made in the case, and find that after making two declarations: (i) That the regulations are not binding on the Peninsular and Oriental Co., and (ii) that the Peninsular and Oriental Co. are not entitled to have appropriated berths except on terms agreed between them and the defendants, it proceeds that the appeal be dismissed without costs to either side.

I This may or may not be a correct order to have made; it may be that it would have been more correct to have dismissed the action, except so far as regards the making of the declaration, but it seems to me to show that the court intended to affirm the decision that no cause of action in the ordinary sense was made out, and still it made the declarations. On looking at the judgments delivered, I think it is made clear that such was the intention of the court. The case as to appropriated berths does not touch the point, and the only possible cause of action in respect of the unappropriated berths was a right to an injunction for a threatened interference by imposing improper conditions by the regulations. LINDLEY, L.J.,

examines that contention, and comes to the conclusion that they had no such right, because there was no reasonable prospect of them wanting such a berth, and no certainty that, if they did, the dock company would insist on the regulations, and he concludes ([1892] 3 Ch. at p. 259):

> "The Peninsular and Oriental Steam Navigation Co. has, in fact, failed to establish its alleged rights, and the order [dismissing the action] must therefore stand."

That seems to me a clear decision that there was no cause of action, apart from that given by the rule, but the learned lord justice went on to say that he thought the Peninsular and Oriental Steam Navigation Co. were entitled to a declaration that the regulations were invalid and could not be imposed on them if they should happen to want an unappropriated berth. BOWEN, L.J., discusses the suggested right at considerable length, and comes to the same conclusion that no injunction could be granted, and KAY, L.J., after discussing the position of the parties, states the question before him in this way (ibid., at p. 273):

> "It is suggested that to make such a decree in this case, if the plaintiffs have no cause of action, would be an excess of jurisdiction; and it has been doubted whether this order gives the court any new jurisdiction. I refer to the case of *Brooking* v. *Maudslay, Son and Field* (15). . . ."

Later he says ([1892] 3 Ch. at p. 273):

> "The strongest mode of stating the objection is that the present plaintiffs, even if the defendants are committing a wrongful act, are not damaged by it, and therefore have no cause of action against the defendants; and that Ord. 25, r. 5, to which I have referred, does not enable the court to make a declaratory decree in such a case, or if it does, it would be ultra vires."

He then points out that the Peninsular and Oriental Steam Navigation Co. are proper plaintiffs because they have the right to ask for an unappropriated berth, although they have never done so, and concurs both in dismissing the action and in making the declaration. This seems to me a clear decision that there may be a right to a declaration, although the person asking for it has no cause of action apart from the rule, and I think *Dyson* v. *A.-G.* (10) and *Burghes* v. *A.-G.* (8) are to the same effect. I do not think it could be contended that the plaintiffs in those cases had any cause of action; the only possible cause would be an injunction because of a threatening and intending to enforce the provisions of the forms, and I do not see how such a cause of action could exist against the Attorney-General as representing the Crown.

The chief authorities relied on in argument for the opposite contentions were a dictum of COLLINS, L.J., in *Williams* v. *North's Navigation Collieries, Ltd.* (4) ([1904] 2 K.B. at p. 49), and a decision of WARRINGTON, J., in *Offin* v. *Rochford R.D.C.* (7), and of JOYCE, J., and the Court of Appeal in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6). In the last case this question was not decided. All that JOYCE, J., and the Court of Appeal decided was that the order should not in that case be made. In the case before WARRINGTON, J., he certainly held that there could be no declaration without a cause of action, but the cases on the point do not seem from the report to have been cited to him, and in *Burghes* v. *A.-G.* (8), after they had been cited, the same learned judge said ([1911] 2 Ch. at p. 155):

> "It is contended that there is no cause of action against the Crown or its officers, that they have broken no contract and have done no legal wrong, nor do they threaten to do so. But Ord. 25, r. 5, is intended to deal with the very case, i.e., one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and, in fact, in several cases declarations have been made under this order where there was no cause of action in the proper sense."

A By "the proper sense" the learned judge no doubt means apart from the provisions of the rule, and he refers to *Jenkins* v. *Price* (9), before SWINFEN EADY, J., where a declaration was made in a case in which it was admitted there was no cause of action. The dictum of COLLINS, L.J., is, in my opinion, opposed to the latter decision, and cannot be supported.

The next contention is that, even if there is no necessity for a cause of action, B the declaration can only be made at the instance of the person claiming the right and intending to assert it if it should become necessary. I can find no such limitation in the words of the rule, and I can see no reason why it should be imposed if it is once established that a declaration can be made where no consequential relief can be given. No such limitation, so far as I know, has been suggested in the analogous procedure under Ord. 54A of declaring rights arising C out of documents. But I think this point again is covered by authority in *Dyson* v. *A.-G.* (10) and *Burghes* v. *A.-G.* (8). The plaintiffs in those cases were not claiming to exercise any right; they claimed a declaration that a document which might be used to make a demand upon them was invalid, and they got it. I think, therefore, that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not; and at the instance of any party who D is interested in the subject-matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the court to express its opinion in order to help him in other transactions. Whether it extends to a declaration that the plaintiff is not liable in an action intended, or proceeding, is a matter I shall discuss in dealing with this particular case.

The next question is whether, if this be the meaning of the rule, the rule is E ultra vires. It is said to be so because it adds to the jurisdiction of the court which cannot be done by rules of practice and procedure. The word "jurisdiction" and the expression "the court has no jurisdiction" are used in two different senses which I think often leads to confusion. The first, and, in my opinion, the only really correct, sense of the expression that "the court has no jurisdiction" is that the court has no power to deal with and decide the disputes as to the subject-matter F before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used—i.e., that although the court has power to decide the questions it will not according to its settled practice do so, except in a certain way and under certain circumstances. The distinction is, I think, well shown by two cases: *Barraclough* v. *Brown* (1) and *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* (16). In the first case there was a true want of jurisdiction. G The power to decide the disputes as to the particular subject-matter had been taken away by statute from the High Court as a court of first instance and given to another tribunal. In the second case the court could decide the dispute and give the relief, but, by a settled practice embodied in a rule, it would not do so except under certain circumstances—i.e., the subject-matter exceeded £10. Yet LORD ESHER, M.R., in *Westbury-on-Severn Rural Sanitary Authority* v. *Meredith* H (16) used the same expression, "the court has no jurisdiction," although clearly what was laid down by a rule could be altered by a rule, and the expression is used in this sense in many cases. It is, I think, necessary to keep this distinction in mind in considering whether this rule is *ultra vires*. If it adds to the jurisdiction in the first sense of giving power to deal with matters which could not in any case or under any circumstances be entertained it is ultra vires, and it is to this state I of things that the remarks of LORD DAVEY in *Barraclough* v. *Brown* (1) ([1897] A.C. at p. 624) were addressed. But if its only effect is to provide that the court may deal with a matter with which it can already deal in a different manner under different circumstances and when brought before it by a different person it is, in my opinion, only dealing with practice and procedure and is intra vires. The latter, in my opinion, is the position in this case. Admittedly, if a declaration as to liability on these bills of exchange were asked for by someone who wanted it for the purpose of getting consequential relief, it could be made, and all that the rule does is to remove the restriction imposed upon the making of it by the

practice of the court. It is worthy of notice, though not conclusive, that the Court of Chancery Procedure Act, 1852, which, by s. 50, gave the right to make a declaration when no consequential relief was given is called: "An Act to amend the Practice and Course of Proceeding in the High Court of Chancery."

There only remains to be considered the circumstances of this particular case. It has been ascertained in the course of the case that the rights of the parties depend upon a question of English law, and, in my opinion, the whole object of this action is either directly by means of an injunction, or indirectly by means of a claim for a declaration, to compel the defendants to litigate the question in England, and not in the United States of America. If this cannot be done, it will very probably be the case that if this declaration were made it would be used to guide the court in the United States to the determination of the point of law, but the real intention is to make it not worth the defendant's while to go on with the action there. It may very well be that it is more convenient to decide the question here, and I regret that the suggestion of BUCKLEY, L.J., was not accepted, but the defendants are entitled to bring their action in the United States, and can only be prevented from doing so on the principles laid down in *Logan* v. *Bank of Scotland* (17). This procedure is open to the plaintiffs, and, if they fail to establish their right in that way, I do not think they should be allowed to obtain it indirectly by this declaration. But the question is whether that goes to the power to make the declaration. I think that a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking for it will be left to get up his defence in the action when it is brought: see per the Master of the Rolls in *Dyson* v. *A.-G.* (10) ([1911] 1 K.B. at p. 417) and per JOYCE, J., in *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6) ([1906] 1 Ch. at pp. 329, 330), but taking the large view that I do of the effect of Ord. 25, r. 5, I am not prepared to say that it is beyond the power of the court in a very exceptional case to make such a declaration, and that the fact of its being asked for a purpose which the court does not approve does not take away the power to make it, but only gives reason to refuse it. I think, therefore, that there is jurisdiction to make this declaration, but as I understand the circumstances now it ought not to be made. In my opinion, the appeal should be dismissed on the ground that this is not a proper case for the summary procedure under Ord. 25, r. 4, and, on the other questions on which our opinion has been asked, I think the court has power to make the declaration, but on the facts at present before me I think it ought not to be made. I think the action should be allowed to proceed to trial, when all the facts can be ascertained and a proper decision arrived at which cannot, in my opinion, be done in the present proceeding. I understand that the question whether, as a matter of discretion, the order should be made was not really argued in the court below. I think, therefore, that the appeal should be dismissed, the order of the learned judge making the costs of the application costs in the cause should stand, and the costs of this appeal should also be costs in the action.

BANKES, L.J.—As presented to this court, the argument for the appellants raised two questions: First, whether upon the true construction of Ord. 25, r. 5, the plaintiffs' claim for a declaration came within the rule; second, whether, if it did, the rule was not ultra vires.

For the consideration of both points, it is, I think, necessary to go back and trace the development of the practice with regard to declaratory judgments, and to consider also the meaning of the term "jurisdiction" when applied to the powers of a court of justice. The term appears to be used in a double sense—sometimes as referring to a case where the matter in dispute is such that it is impossible for any court, or sometimes for a particular court, to entertain it, as, for instance, where a court is asked to enforce an agreement which is made void by statute, or, as in *Barraclough* v. *Brown* (1), where exclusive jurisdiction had been given by statute to a court other than that in which the application was made; and some-

A times as referring to a case where the particular court refused to entertain some matter in dispute on the ground that it was not matter proper or convenient for it to adjudicate upon. I think this distinction is well brought out in the opinion of LORD HERSCHELL in *British South Africa Co.* v. *Companhia de Moçambique* (18). It was in this latter sense, I think, that the Vice-Chancellor was speaking in *Rooke* v. *Lord Kensington* (19) (2 K. & J. at pp. 760, 761), where he says that there B was no jurisdiction in the Court of Chancery before the Court of Chancery Procedure Act, 1852, to make a simple declaration of right where no consequential relief was claimed. I cannot doubt that if the Court of Chancery of those days thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so. It was, among other things, to amend the practice and procedure of the Court of Chancery in this respect that s. 50 of the C Act of 1852 was passed. The preamble of the statute makes this point clear. The section itself is in these terms:

> "No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief."

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The effect of this section was that it extended the process theretofore exercised by the Court of Chancery in relation to declarations of right to cases where no consequential relief was claimed; and it did this as a matter of the procedure or practice of the court.

In interpreting this section the Court of Chancery held that the plaintiff could E not file a bill for a mere declaration unless there was some consequential relief which the court had the power to grant although the plaintiff had not in fact claimed it. JAMES, L.J., in *Cox* v. *Barker* (13) (3 Ch.D. at p. 370) indicates that in his opinion this was a somewhat narrow view to take; but this was the view held until the making in 1883 of R.S.C., Ord. 25, r. 5, upon which the question in this case turns. That rule is in these terms:

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> "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

It is obvious from a mere reading of the language of the rule that it introduces a G considerable extension into the practice previously existing. It enables the court to make the declaration irrespective of whether consequential relief could be claimed or not. LORD LINDLEY, M.R., in *Ellis* v. *Duke of Bedford* (14) ([1899] 1 Ch. at pp. 514, 515), refers to this as an innovation of an important kind. FARWELL, L.J., in *Chapman* v. *Michaelson* (5) ([1909] 1 Ch. at p. 243), refers to it as a novel practice created by the Supreme Court of Judicature Act, which H cannot be limited by the old equitable practice; and WARRINGTON, J., in *Burghes* v. *A.-G.* (8) ([1911] 2 Ch. at p. 155), differing in this apparently from what he had previously said in *Offin* v. *Rochford R.D.C.* (7) ([1906] 1 Ch. at pp. 357, 358), says that the order is intended to deal with the very case—that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future, and that several cases had occurred where declarations had been I made under the order where there was no cause of action in the proper sense, and he cites *Jenkins* v. *Price* (9) as an example. A later and still more forcible instance of the same view is to be found in *Dyson* v. *A.-G.* (10), the question being as to the validity of a Form 4 notice. FLETCHER MOULTON, L.J., says ([1912] 1 Ch. at p. 168) that

> "an action thus framed [that is, asking for a declaration of right] is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions."

In *Jenkins* v. *Price* (9) SWINFEN EADY, J., granted the declaration of right asked for, but without costs, because the plaintiff had no cause of action, and EVE, J., followed the same course in *Evans* v. *Levy* (20). In spite of these authorities counsel for the defendants contends that the rule is ultra vires to the extent to which it purports to add to the jurisdiction conferred upon the Court of Chancery by the Court of Chancery Procedure Act, 1852. He rests his argument upon ss. 16 and 23 of the Supreme Court of Judicature Act, 1873, and s. 17 of the Supreme Court of Judicature Act, 1875. By virtue of these sections the jurisdiction which at the commencement of the Act of 1873 was vested in or capable of being exercised by (inter alia) the High Court of Chancery was transferred to the High Court to be exercised by that court (so far as regards procedure and practice) in the manner provided by the Act, or by such rules and orders of court as might be made under the Act, and where no special provision was contained therein it should be exercised as nearly as might be in the manner as the same might have been exercised by the Court of Chancery. By s. 17 of the Act of 1875 power is given to the Crown by Order in Council to make further rules for carrying the Act of 1873 into effect, and in particular to make rules for regulating the practice and procedure in the High Court and any matter relating to such practice and procedure.

At the time of the passing of the Supreme Court of Judicature Act, 1873, there were two statutes defining the jurisdiction of the Court of Chancery which it is material to consider—namely, the Court of Chancery Procedure Act, 1852, and the Chancery Regulation Act, 1862 [repealed]. I have already referred to the material section of the first of these Acts. The later Act directed the Court of Chancery to determine every question of law and fact incident to the relief sought, even though such questions were cognisable in a court of common law. As a result of this last statute the Courts of Chancery apparently felt themselves bound in some cases to make a declaratory order, even though the case was one in which they refused to make a declaration of right: see *Jenner* v. *Jenner* (21). This was the state of things in 1883, in which year both the above statutes were repealed by the Statute Law Revision and Civil Procedure Act, 1883, and the way was clear for the Rule Committee to lay down what the practice and procedure of the court should be. They made Ord. 25, r. 5. The order extends the previous practice, just as the statute of 1852 had done, but, in my opinion, the extension in each case was an extension of the practice and procedure of the court, and, subject to the limitation to which I refer later, the extension contained in Ord. 25, r. 5, was one which the Rule Committee was competent to make. I am, therefore, of opinion that both on principle and on authority the contention that the rule is ultra vires fails.

The question as to the construction of the language of the rule is a difficult one. The rule is framed in two branches. It first provides that no action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby. It then goes on to say that the court may make binding declarations of right whether consequential relief is or could be claimed or not. The first question to decide is whether the rule is dealing with declaratory judgments or orders as one thing and declarations or right as another and distinct thing, or whether the declaratory judgments and orders referred to are judgments and orders in the form of declarations of right. I think the framers of the rule must have had the previously existing practice in mind, and have provided both for the case of declaratory judgments and orders which are declarations of right and those which are not. If the other interpretation is put upon the rule, I should be prepared to hold that what the plaintiffs are asking for in their action is not a declaration of right at all. It is quite true that the extension made by the rule has entirely altered the character of the right which it is permissible for a plaintiff to ask to have a declaration upon; but, in my opinion, the expression "declaration of right" in the rule must be read in the sense which it had always previously borne—that is to say, a declaration of some right which the plaintiff maintains that he has

against the person or persons whom he has made parties to his suit. Here the respondents are claiming nothing of the kind. What they are asking is that the court shall define their obligations to the defendant. I do not think that the alteration in the character of the right which a plaintiff is entitled to assert under the rule can have the effect contended for, of altering the expression "declaration of right" into either a declaration of rights of the parties, or into a declaration as to the obligations of either party. These considerations are not, however, in my opinion, sufficient to dispose of this appeal, because I think that the rule contemplates the making of declaratory judgments and orders which may not be declarations of right.

In my opinion, the clue to the real meaning of the rule is to be found in the opening words. The rule deals with actions and proceedings. For the present purpose it is only necessary to consider an action. An action is a civil proceeding commenced by a writ (Supreme Court of Judicature Act, 1873, s. 100 [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 225]), and in every action there must be a plaintiff who is a person seeking relief (ibid.), or, to use the language of R.S.C., Ord. 16, r. 1, a person in whom a right to relief is alleged to exist. It is the person, therefore, who is seeking relief, or in whom a right to relief is alleged to exist, whose application to the court is not to be defeated because he merely applies for a declaratory judgment, or order, and whose application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word "relief"? When once it is established, as I think it is established, that relief is not confined to relief in respect of a cause of action, it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it; that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors, I think the rule should receive as liberal a construction as possible.

A great number of decisions have been cited to us. If the test which I have suggested is applied to them, I think it will be found that the plaintiff was in each case claiming some relief, and a relief which, though in many cases not resting on a cause of action, was nevertheless within the limitation I have indicated above. In some of the cases the plaintiff was asserting a cause of action, but in many of them he was not. The character of the relief sought varied considerably. For instance, in *Dyson* v. *A.-G.* (10) the relief claimed was a relief from the obligation to comply with a Form 4 notice under the Finance (1909–10) Act, 1910, on the ground that the notice was ultra vires and invalid. The same kind of relief was asked for in *Burghes* v. *A.-G.* (8). An analogous kind of relief was applied for in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2). In *Lofthouse Colliery, Ltd.* v. *Ogden* (12) the plaintiff claimed relief upon the ground that he was receiving less wages than he was entitled to, and he asked the court to decide the point upon which his right to the wages he claimed depended. In *Société Maritime et Commerciale* v. *Venus Steam Shipping Co., Ltd.* (11) the relief claimed was to be relieved from performing the obligations under a contract upon the ground that the plaintiffs were not bound by it to the defendants who were insisting upon its performance. Order 54A, r. 1, deals in terms with a case where anticipatory relief depending upon the construction of a document is claimed. This rule gives the applicant a right to proceed by originating summons, but this is for convenience merely. I cannot doubt that if the applicant preferred to proceed by action the court would have jurisdiction to deal with his claim under Ord. 25, r. 5. In *Chapman* v. *Michaelson*

(5) Eve, J., brings out very clearly in his judgment the view I take as to the operation of this rule where in reference to the plaintiff's claim for a declaratory judgment as to certain facts, he said ([1908] 2 Ch. at p. 619) that the plaintiff took upon himself to establish certain facts which, if established, would entitle him to statutory relief. The only cases which appear to me to be contrary to the view which I have expressed as to the meaning of the rule are *Williams* v. *North's Navigation Collieries, Ltd.* (4), where the then Master of the Rolls suggested ([1904] 2 K.B. at p. 49) that the declaration referred to in the rule must be ancillary to the putting in suit of a legal right: this, however, was only a dictum; *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (6), where, however, it will be seen both parties admitted that the matter was one in which the learned judge could exercise a discretion; and *Offin* v. *Rochford R.D.C.* (7), a decision of Warrington, J., who later, as I have already pointed out, took a different view as to the meaning of the rule.

I pass now to consider whether the present plaintiffs' claim comes within the rule, as I have endeavoured to interpret it. Are they, by their present action, claiming any relief or any relief which the court can recognise? For the purpose of deciding this question, it is necessary to look at the substance as well as the form of the claim. The view I take of the plaintiffs' case is that what they really want is to stay the proceedings in America, and that the claim for the declaration is merely ancillary to the claim for an injunction. The first step after the issue of the writ was the summons for an injunction; and this was supported by the affidavit of Mr. Russell, who submitted that the bringing and prosecution of the action in America was vexatious and embarrassing and likely to result in grave injustice to the plaintiffs. I did not understand counsel for the plaintiffs to dispute that the plaintiffs' real desire in bringing the action was to get the dispute between themselves and the defendants tried in England instead of in America. The desire is one which it is easy to understand, but is it one which the court can gratify? That depends entirely, in my opinion, upon facts which are not before us, and upon which no argument was addressed to this court, or apparently to the court below, though it was indicated in the affidavit to which I have referred. If the plaintiffs' claim for a declaration is to be taken by itself, and their rights under the rule are to be decided without reference to the claim for an injunction, then, in my opinion, their action is not maintainable. The claim for a declaration is not in itself a claim for relief; and no circumstances are shown from which an inference can be drawn that, underlying the claim, though not apparent on the face of it, there is a claim to relief which the court can entertain. The circumstances might have been quite different had a case been made for the plaintiffs that the American proceedings were vexatious and that the present action had been brought to obtain relief from those proceedings, and to bring the defendants before the court in order to compel them to litigate the dispute in this country. The court clearly has jurisdiction to grant an injunction restraining a person from commencing or continuing proceedings abroad if it thinks those proceedings are vexatious: see *Bushby* v. *Munday* (22); *Hyman* v. *Helm* (23); *Wood* v. *Connolly Bros., Ltd.* (24). A strong case, however, must be made out; and, as was said by Brett, M.R., in *Hyman* v. *Helm* (23) (24 Ch.D. at p. 537), the fact that an action is brought at an inconvenient place is not the sort of vexation upon which the court can act.

The conclusion to which I have come upon the whole matter is that, if the plaintiffs could establish any ground for relief from any further proceeding in the American courts, then this court would have jurisdiction to give them that relief, not only by the granting of an injunction, but by the making of a declaratory judgment or order upon the matter in dispute between the parties, but short of making out such a case, I am of opinion that the court has no jurisdiction to entertain the plaintiffs' claim. In the absence of any such case the plaintiffs' application to the court is not an action seeking relief at all. It is merely a request to the court to supply them with evidence in a convenient form for use in

A the American action, and to supply it against the will of the defendants, and possibly at their expense. In my opinion, such a proceeding is not within Ord. 25, r. 5, at all. The matter comes before us in an unfortunate form. The substance of the appeal is to obtain a decision of this court upon the view expressed by the learned judge as to the meaning of the order, but the form of the appeal is for an order striking out the action so far as it relates to the claim for a declaration. B I have already stated the grounds upon which I disagree with the view taken by the learned judge, but I cannot say at the present stage, and upon the information at present before the court, that the court has no jurisdiction. I think, therefore, that the appeal must fail. In saying this I desire to make it quite plain that, though I am not in a position to decide the point, I think it extremely unlikely that a case can be made out giving the court jurisdiction to entertain this claim C or justifying the exercise of the jurisdiction if the court possesses it. I agree with the order suggested by PICKFORD, L.J.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, for *Simpson, North, Harley & Co.*, Liverpool; *Crosley & Burn.*

D [*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

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FELSTEAD *v.* REGEM

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Parker of Waddington, and Lord Reading), February 26, F April 7, 1914]

[Reported [1914] A.C. 534; 83 L.J.K.B. 1132; 111 L.T. 218; 78 J.P. 313; 30 T.L.R. 469; 58 Sol. Jo. 534; 24 Cox, C.C. 243; 10 Cr. App. Rep. 129]

G *Criminal Law—Appeal—Appeal by person found to be guilty, but insane—Competency—Trial of Lunatics Act*, 1883 (46 & 47 *Vict.*, *c.* 38), *s.* 2 (1)—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 3.

An accused person who, by a special verdict under s. 2 (1) of the Trial of Lunatics Act, 1883, has been found to have done the act charged against him, but to have been insane at the time, is not a "person convicted on indictment" within s. 3 of the Criminal Appeal Act, 1907, and so has no right of appeal H to the Court of Criminal Appeal against that part of the verdict which found that he was insane at the time of doing the act.

R. v. *Ireland* (1), [1910] 1 K.B. 654, and *R.* v. *Machardy* (2), [1911] 2 K.B. 1144, overruled.

Notes. Applied: *R.* v. *Taylor*, [1915] 2 K.B. 709. Followed: *R.* v. *Duke* (1961), I The Times, Oct. 10. Referred to: *Re Houghton*, *Houghton* v. *Houghton*, [1915] 2 Ch. 173; *Re Pitts*, *Cox* v. *Kilsby*, [1931] All E.R.Rep. 645; *Beresford* v. *Royal Insurance Co.*, [1937] 2 All E.R. 243.

As to insanity in relation to the criminal law, see 10 HALSBURY'S LAWS (3rd Edn.) 287–289; and for cases see 14 DIGEST (Repl.) 365, 366.

Cases referred to:

(1) *R.* v. *Ireland*, [1910] 1 K.B. 654; 79 L.J.K.B. 338; 102 L.T. 608; 74 J.P. 206; 26 T.L.R. 267; 54 Sol. Jo. 543; 22 Cox, C.C. 322; 4 Cr. App. Rep. 74, C.C.A.; 14 Digest (Repl.) 365, *3543.*

(2) *R.* v. *Machardy*, [1911] 2 K.B. 1144; 80 L.J.K.B. 1215; 105 L.T. 556; 76 J.P. 6; 28 T.L.R. 2; 55 Sol. Jo. 757; 22 Cox, C.C. 614; 6 Cr. App. Rep. 272, C.C.A.; 14 Digest (Repl.) 365, *3544*. A

(3) *R.* v. *Oxford* (1840), 9 C. & P. 525; 4 State Tr.N.S. 497; 1 Town. St. Tr. 102; 14 Digest (Repl.) 60, *235*.

Also referred to in argument: B

R. v. *Hill* (1911), 105 L.T. 751; 76 J.P. 49; 28 T.L.R. 15; 22 Cox, C.C. 625; 7 Cr. App. Rep. 26, C.C.A.; 14 Digest (Repl.) 365, *3345*.

R. v. *Stokes* (1848), 3 Car. & Kir. 185; 14 Digest (Repl.) 64, *273*.

R. v. *Davies* (1858), 1 F. & F. 69; 14 Digest (Repl.) 61, *250*.

R. v. *Tolson* (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 37 W.R. 716; 5 T.L.R. 465; 16 Cox, C.C. 629, C.C.R.; 15 Digest (Repl.) 890, *8578*. C

M'Naghten's Case (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr.N.S. 847; 1 Town. St. Tr. 314; 1 Car. & Kir. 130, n.; sub nom. *Insane Criminals*, 8 Scott, N.R. 595, H.L.; 14 Digest (Repl.) 60, *246*.

Appeal from a decision of the Court of Criminal Appeal (Sir Rufus Isaacs, C.J., Bray and Lush, JJ.), reported 9 Cr. App. Rep. 227. D

The appellant was charged with wounding his wife with intent to do her grievous bodily harm. At the trial, which took place at the Derby Assizes before Rowlatt, J., the jury, under the Trial of Lunatics Act, 1883, found him guilty of the act but insane at the time, and an order was made for his detention during His Majesty's pleasure. The appellant appealed to the Court of Criminal Appeal against that part of the verdict which found he was insane at the time of doing the act. The court held they were bound to follow their decision in *R.* v. *Machardy* (2), and they, therefore, entertained the appeal and dismissed it. The appellant then obtained the necessary certificate from the Attorney-General and appealed to the House of Lords. E

Charles A. McCurdy for the appellant. F

The Attorney-General (*Sir John Simon*, *K.C.*), *Branson* and *Tinsley Lindley* for the respondent.

Their Lordships took time for consideration.

April 7, 1914. **LORD READING, C.J.**, read the following opinion.—The appellant was indicted for wounding with intent to do grievous bodily harm. The jury G returned a special verdict, in accordance with s. 2 (1) of the Trial of Lunatics Act, 1883 [amended by Mental Health Act, 1959, s. 149 (2), Sched. 7; and see s. 71 (1)–(4): 39 Halsbury's Statutes (2nd Edn.) 1025, 1079, 1125], that the prisoner was guilty of the act charged in the indictment as an offence, but was not responsible for his actions at the time, and thereupon the learned judge made an order for the safe custody of the appellant, under s. 2 (2) of that statute. The H appellant gave notice of appeal to the Court of Criminal Appeal against that part of the verdict which found that he was not responsible for his actions at the time of doing the act. The Court of Criminal Appeal held that they were bound to follow their decision in *R.* v. *Machardy* (2), that they had no jurisdiction to hear and determine the appeal, and consequently dismissed it upon that ground. The appellant then applied to the Attorney-General for his certificate under s. 1 (6) of I the Criminal Appeal Act, 1907, and he granted the application, and issued his certificate authorising the appellant to appeal to your Lordships' House.

The sole question for the decision of this House is whether an accused person who, by the special verdict, is found guilty of the act, but insane at the time, can appeal to the Court of Criminal Appeal against that part of the verdict which finds that he was insane at the time of doing the act. If there is any right of appeal it can only be that conferred by the Criminal Appeal Act, 1907. This Act was passed to establish a Court of Criminal Appeal and to amend the law relating to appeals

A in criminal cases, and there is no right of appeal to the Court of Criminal Appeal, and no jurisdiction in that court to hear an appeal unless the appellant can bring himself within that statute. By s. 3 of the Criminal Appeal Act, 1907:

> "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal."

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Unless a person is a "person convicted on indictment" there is no right of appeal against the verdict or any part of it; therefore, the question is whether by reason of the special verdict under the Trial of Lunatics Act, 1883, or any part of such verdict, the accused is "a person convicted on indictment."

In order fully to understand the effect of such a special verdict it is well to C examine the history of the law before the passing of the Trial of Lunatics Act, 1883. In the earliest times proofs of insanity when he committed the act charged did not entitle the accused to an acquittal, but to a special verdict carrying with it a right to a pardon. The same course was taken when the accused had killed a man by misadventure or in self-defence: see 1 Rot. Parl. 444; 3 Edw. 2 (1310) and FitzHerbert's Grand Abridgement, sub tit. "Corone," s. 351. At a later period D the jury in cases of insanity could either find a general verdict of Not Guilty or a special verdict that the accused committed the act, but that at the time he was non compos mentis, and thereupon the court gave judgment of acquittal: see Hale's Pleas of the Crown, Edn. of 1800, vol. 1, p. 28, and Sir Michael Foster's Crown Law (3rd Edn.), s. 1, p. 279. It is to be observed that in such cases the result of either a general or a special verdict was the acquittal of the E accused, and in the words of the preamble of the subsequent statute of 1800, "it may be dangerous to permit persons so acquitted to go at large." In the public interest it became necessary to provide for the safe custody of the insane person notwithstanding the verdict of acquittal. Consequently the statute of 1800 (39 & 40 Geo. 3, c. 94) entitled "An Act for the safe custody of insane persons charged with offences" was passed. It was there enacted

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> "that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether G such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of committing such offence the court before whom such trial shall be had shall order such person to be kept in strict custody, in such place and in such manner as to the court shall seem fit, until His Majesty's pleasure shall be known."

H The intention of the legislature as manifested by this statute was to provide for the safe custody of persons who were found by the jury to be insane (a) at the time of committing the offence, or (b) upon arraignment, or (c) upon trial, or (d) upon being brought before any court to be discharged for want of prosecution. In the last-mentioned case, it will be observed upon examination of s. 2 that if a I person brought before the court to be discharged for want of prosecution should appear to be insane, the court was empowered to empanel a jury to try his sanity, and if the jury found him insane, the court could order his detention for safe custody during His Majesty's pleasure. Under this statute the finding of the jury that the accused was insane at the time of committing the offence was not a conviction of any offence, but was an acquittal on account of insanity empowering the court to order the safe custody of the accused during His Majesty's pleasure. The alteration in the law made with reference to a person insane at the time of committing the offence charged against him was that although he was acquitted

of the crime he was detained as a lunatic. As LORD DENMAN, C.J., said in *R.* v. *Oxford* (3) (9 C. & P. at p. 550):

> "The statute must mean the jury are to find that that act has been done by the prisoner which fixes him as a criminal unless he is a lunatic,"

implying that, if he is a lunatic, he is not a criminal, and is not convicted of any offence.

The last stage was the Trial of Lunatics Act, 1883, which is the statute now applicable. It made no substantial difference in the administration of the law, except that it enacted that where upon evidence the jury are satisfied that the accused did the act charged, but was insane so as not to be responsible according to law for his actions at the time he did the act, they must return a special verdict to that effect. That is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence. In other words, this verdict means that upon the facts proved the jury would have found him guilty of the offence had it not been established to their satisfaction that he was at the time not responsible for his actions, and, therefore, could not have acted with a "felonious" or "malicious" mind, which is an essential element of the crime charged against him. The indictment of the appellant was for "feloniously" and "maliciously" wounding Lilian Ann Felstead, with intent to do her grievous bodily harm. It is obvious that if he was insane at the time of committing the act he could not have had a mens rea, and his state of mind could not then have been that which is involved in the use of the term "feloniously" or "maliciously," for crimen non contrahitur, nisi voluntas nocendi intercedat. It was argued that, as the Trial of Lunatics Act, 1883, provided under s. 2 that where such a special verdict is found the accused should be kept in custody as a criminal lunatic, the legislature must have intended the special verdict to operate as a conviction of a crime. In my judgment this contention is not well founded. By the use of the term "criminal lunatic" the legislature meant by a compendious reference to bring into operation the powers given under the Criminal Lunatics Asylums Act, 1860 [repealed by Mental Health Act, 1959], which provided for detention in certain asylums, and under certain conditions, both of persons found insane and acquitted under the aforementioned Act of 1800 and of convicted persons who became insane during confinement in prison. It was also contended that, as by s. 20 of the Criminal Appeal Act, 1907, writs of error and other modes of bringing a verdict and judgment under review had been abolished, the legislature must have intended to give a right of appeal to the Court of Criminal Appeal whenever such a special verdict was found. It must, however, be borne in mind that your Lordships are deciding the proper interpretation to be placed upon the words of the statute, and cannot extend the right of appeal to those who, in your Lordships' opinion, are not persons "convicted on indictment."

I have for these reasons come to the conclusion that the appellant is not a "person convicted on indictment." By the verdict of the jury he has been acquitted of the crime, and the order for his detention for safe custody is consequent upon the finding of insanity, and is not for a fixed period but during His Majesty's pleasure. The effect of this conclusion is to affirm the decision of the Court of Criminal Appeal that they had no jurisdiction to hear and determine the appeal of the appellant. That court arrived at this decision because of the judgment in *R.* v. *Machardy* (2) which affirmed *R.* v. *Ireland* (1). In the latter case the Court of Criminal Appeal held that when a special verdict under the Trial of Lunatics Act, 1883, was found in reference to the accused he was "a person convicted on indictment," and, therefore, had a right of appeal under the Criminal Appeal Act, 1907. The court was largely influenced to their conclusion by reason of the use of the word "guilty" in the special verdict. It is unfortunate that this word is there used, as it suggests the responsibility for a criminal act. If the requirement under the statute had been merely to find that the accused did the act, instead of that he was guilty of the act, there could have been no room for

A doubt that such a verdict was not a conviction, but was an acquittal. *R.* v. *Machardy* (2) was a decision of the majority of the court (consisting of five judges), constituted to consider *R.* v. *Ireland* (1), and whether an appeal lay against such part of the special verdict as found the accused insane. The majority of the judges approved the decision of *R.* v. *Ireland* (1), but held that an appeal could be brought only against the first part of the verdict, and that, as the second part was in aid B and relief of the accused, he could not appeal against it. Thus the court divided the verdict into two parts, and held that no appeal lay against that part relating to insanity. The special verdict is, in my opinion, one and indivisible by reason of the statutory provision and takes the place of the general verdict of "Not Guilty," and is a verdict of acquittal of the accused. It is worthy of observation that, if the appellant succeeded in his present contention and established on the C hearing of the appeal that the verdict as to insanity should be set aside, he would be entitled forthwith to be set at liberty, for the remaining part of the verdict could not justify the passing of any sentence upon him, as it does not find him guilty of having committed an offence, but only of having done the act charged. I am of opinion, for the reasons given, that this appeal should be dismissed.

D **LORD ATKINSON.**—I concur in the judgment which has just been delivered by my noble and learned friend, and I have been requested by **LORD DUNEDIN** and **LORD PARKER OF WADDINGTON** to express on their behalf their concurrence also.

VISCOUNT HALDANE, L.C.—I also concur in the judgment of my noble and E learned friend LORD READING, and **LORD MOULTON** has asked me to intimate to your Lordships that he concurs in the opinion that has been delivered.

Solicitors: *P. Wellington Taylor*; *Director of Public Prosecutions.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

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NOCTON *v.* LORD ASHBURTON

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Shaw and Lord Parmoor), April 23, 24, 27, May 1, 8, June 19, 1914]

[Reported [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 30 T.L.R. 602]

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Misrepresentation—Innocent misrepresentation—Advice given in performance of duty—Error made in good faith—Liability of adviser.

Solicitor—Duty to client—Fiduciary relationship—Full disclosure of personal interest and all relevant matters when advising client—Liability on breach of duty.

I An action for deceit cannot be maintained without proof of actual fraud, i.e., proof of mens rea—that a false representation was made knowingly, or without belief in its truth, or recklessly without caring whether it was true or false: *Derry* v. *Peek* (1) (1889), 14 App. Cas. 337; but where a duty is laid on one person to give information or advice to another, on which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer although the information or advice has been given, not fraudulently, but in good faith, and the recipient of the information or advice will be entitled

to compensation for any loss which he has suffered, by reason of the misrepresentation. A

A solicitor was associated with a client in transactions relating to the development of land in the course of which both the solicitor and the client advanced money on mortgage, and to raise further sums the solicitor requested the client to make a certain property available for mortgage by releasing it from the security of his own mortgage. The effect of the release would be to improve B the position of the security held by the solicitor for his loan from a second to a first mortgage, but he did not inform the client of that fact nor fully explain to him other matters relating to the release. In an action by the client against the solicitor for a declaration that the solicitor had improperly advised him and for an order for indemnity against loss of interest and the replacement of the sum advanced, charges of fraud being found not to have been made out, C

Held: the solicitor had been in a fiduciary position towards his client, and that position imposed on him the duty to make a full, and not a misleading, disclosure of facts known to him when advising his client; the fact that the client had the means to correct the false impression conveyed to him by the solicitor, but did not inquire into what he had been told, did not avail the solicitor; and, therefore, the solicitor was liable to compensate the client for D any loss caused by his breach of duty.

Notes. Referred to: *Bell* v. *Lever Bros., Ltd.*, [1931] All E.R.Rep. 1; *Terrene, Ltd.* v. *Nelson*, [1937] 3 All E.R. 739; *Halifax Building Society* v. *Salisbury*, [1939] 4 All E.R. 427; *Bradford Third Equitable Building Society* v. *Borders*, [1941] 2 All E.R. 205; *Candler* v. *Crane, Christmas & Co.*, [1951] 1 All E.R. 426; *Armstrong* v. *Strain*, [1952] 1 All E.R. 139; *Otter* v. *Church, Adams, Tatham & Co.*, [1953] 1 All E.R. 168. E

As to innocent misrepresentation and the action for deceit, see 26 Halsbury's Laws (3rd Edn.) 847 et seq., 862 et seq.; and for cases see 35 Digest 25 et seq. As to the duty of a solicitor towards his client, see 31 Halsbury's Laws (2nd Edn.) 116 et seq.; and for cases see 42 Digest 76 et seq.

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Cases referred to:

(1) *Peek* v. *Derry* (1887), 37 Ch.D. 541; 57 L.J.Ch. 347; 59 L.T. 78; 36 W.R. 899, C.A.; reversed sub nom. *Derry* v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

(2) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, *163*. G

(3) *Edelsten* v. *Edelsten* (1863), 1 De G.J. & Sm. 185; 7 L.T. 768; 9 Jur.N.S. 479; 11 W.R. 328; 46 E.R. 72, L.C.; 43 Digest 217, *614*.

(4) *Bourne* v. *Swan and Edgar, Ltd., Re Bourne's Trade Marks*, [1903] 1 Ch. 211; 72 L.J.Ch. 168; 51 W.R. 213; 19 T.L.R. 59; 47 Sol. Jo. 92; 20 R.P.C. 105; 43 Digest 177, *311*.

(5) *Angus* v. *Clifford*, [1891] 2 Ch. 449; 60 L.J.Ch. 443; 65 L.T. 274; 39 W.R. H 498; 7 T.L.R. 447, C.A.; 35 Digest 54, *488*.

(6) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 9, *24*.

(7) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 40 W.R. 50; 7 T.L.R. 582, C.A.; 35 Digest 33, *254*.

(8) *Burrowes* v. *Lock* (1805), 10 Ves. 470; 32 E.R. 927; 35 Digest 34, *261*.

(9) *Slim* v. *Croucher* (1860), 1 De G. F. & J. 518; 29 L.J.Ch. 273; 2 L.T. 103; I 6 Jur.N.S. 437; 8 W.R. 347; 45 E.R. 462, L.C. & L.JJ.; 35 Digest 34, *262*.

(10) *Earl of Chesterfield* v. *Jansen* (1751), 1 Atk. 301; 2 Ves. Sen. 125; 26 E.R. 191, L.C.; 35 Digest 39, *328*.

(11) *Evans* v. *Bicknell* (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest 33, *249*.

(12) *Torrance* v. *Bolton* (1872), 8 Ch.App. 118; 42 L.J.Ch. 177; 27 L.T. 738; 37 J.P. 164; 21 W.R. 134, L.JJ.; 35 Digest 66, *624*.

(13) *Denn d. Bulkley* v. *Wilford* (1826), 8 Dow. & Ry.K.B. 549; 4 L.J.O.S.K.B. 295; 35 Digest 138, *366*.

(14) *British Mutual Investment Co.* v. *Cobbold* (1875), L.R. 19 Eq. 627; 23 W.R. 487; sub nom. *British Mutual Investment Co., Ltd.* v. ——, 44 L.J.Ch. 332; 32 L.T. 251; 42 Digest 106, *1001.*

(15) *Burdick* v. *Garrick* (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 18 W.R. 387, L.C. & L.J.; 42 Digest 228, *2603.*

(16) *Cockburn* v. *Edwards* (1881), 18 Ch.D. 449; 51 L.J.Ch. 46; 45 L.T. 500; 30 W.R. 446, C.A.; 42 Digest 87, *787.*

(17) *Archbold* v. *Charitable Bequests for Ireland Comrs.* (1849), 2 H.L.Cas. 440; 13 L.T.O.S. 249; 9 E.R. 1159, H.L.; 35 Digest 68, *650.*

(18) *Thom* v. *Bigland* (1853), 8 Exch. 725; 1 C.L.R. 38; 22 L.J.Ex. 243; 21 L.T.O.S. 62; 1 W.R. 290; 155 E.R. 1544; 35 Digest 58, *532.*

(19) *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890; 29 L.J.Ex. 382; 2 L.T. 406; 6 Jur.N.S. 1035; 8 W.R. 545; 157 E.R. 1437; 35 Digest 68, *654.*

(20) *Hickson* v. *Lombard* (1866), L.R. 1 H.L. 324; 35 Digest 69, *659.*

(21) *Bank of Montreal* v. *Stuart*, [1911] A.C. 120; 80 L.J.P.C. 75; 103 L.T. 641; 27 T.L.R. 117, P.C.; 42 Digest 113, *1096.*

(22) *Peek* v. *Gurney* (1873), L.R. 6 H.L. 377; 43 L.J.Ch. 19; 22 W.R. 29, H.L.; 35 Digest 21, *119.*

Appeal from an order of the Court of Appeal (Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ.), reversing in part a decision of Neville, J., in an action in which the respondent was plaintiff and the appellant defendant.

The appellant had acted as solicitor for the respondent in certain land and building transactions relating to property in which the appellant was also interested as a principal, and the question was whether the appellant had acted fraudulently in advising the respondent to release a part of the property from a mortgage which he had upon it.

Neville, J., held that, although the appellant had advised the respondent badly, and had fallen short of his duty as a solicitor to his client, the evidence did not establish fraud, and he dismissed the action. The Court of Appeal held that fraud was made out, and that a case based upon fraud could not be turned into a case based on negligence, and gave judgment for the respondent. The appellant appealed.

The facts are set out in the opinions of Lord Dunedin.

P. O. Lawrence, *K.C.*, *Peterson*, *K.C.*, and *J. W. Manning* for the appellant.

Sir R. B. Finlay, *K.C.*, *Jenkins*, *K.C.*, and *A. à Beckett Terrell* for the respondent.

Their Lordships took time for consideration.

June 19, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—Owing to the mode in which this case has been treated both by the learned judge who tried it and by the Court of Appeal, the question to be decided has been the subject of some uncertainty and much argument. But when the real character of the litigation has been made plain, the difficulties which have attended the giving of relief appear to have been concerned with form and not with substance.

The action was brought by the respondent, Lord Ashburton, against the appellant, who had acted as his solicitor, for a declaration that the solicitor had improperly advised and induced him to advance £65,000 upon a mortgage made in 1904 by other clients of the solicitor, a transaction out of which the solicitor was said to have got an advantage for himself, and for an order for indemnity against loss of interest and for replacement of the sum advanced. This was the prominent head of the relief sought. But by the statement of claim a further case was made which was really covered by the main relief asked for, and only arose if, as happened, the claim for replacement of the amount of the mortgage was barred by acquiescence or by the Statute of Limitations. It was alleged that subsequently, in December, 1905, a date within six years from the issue of the writ, the solicitor had improperly and in bad faith advised and induced Lord Ashburton to release

from the latter's mortgage a valuable part of the security, knowing that the security would thereby be rendered insufficient, and that this was done by the solicitor in order that he might benefit in respect of a charge for £15,000 in which he was interested, by rendering it a first charge. He was alleged to have represented untruly that the remaining security would be sufficient, and it was further alleged that it was insufficient, and that loss both of security for the principal sum of £65,000 and of interest had occurred in consequence of the release. The defence was knowledge of the facts and of the position of the appellant on the part of Lord Ashburton, as well as a denial of the material allegations in the statement of claim, and a plea of the Statute of Limitations.

I do not propose to enter into an examination of the evidence. The action was tried before NEVILLE, J., who had the appellant and the respondent before him in the witness-box. He treated the case as one of fraud simply, as, indeed, according to the statement of claim, in one sense it was. Fraud, he said, must be clearly and unmistakably proved, and it was not enough to prove the mere fact that a solicitor, in advising his client, was actuated by the belief that some advantage would accrue to himself. He found that, although the respondent "fell far short of the duty which he was under as a solicitor" to the appellant, he did not intend to defraud him, but that he would probably have given different advice had he not been personally interested in the result. The learned judge was no doubt influenced by the fact that Lord Ashburton had previously embarked, to the knowledge and with the co-operation of the appellant, in other speculative transactions of large amounts, and that the release of the particular security in question might have enabled the mortgagors to raise more money and develop the value of Lord Ashburton's remaining security. At all events, he held that, while the appellant had failed in his duty and given bad advice, the case as launched was one in which charges of actual fraud had been made as its foundation, and that, these charges having, as he thought, failed, the action ought to be dismissed. The Court of Appeal took a different view. They held that the solicitor had, on the evidence, been guilty of actual fraud, so that an action of deceit would lie. If the action had been one of negligence they thought it would have been undefended, but the Master of the Rolls, in agreement with NEVILLE, J., said that "it would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence." As, however, they came to the conclusion that the solicitor had been guilty of actual deceit, this point was not important. The Court of Appeal, therefore, gave judgment for Lord Ashburton, and directed an inquiry as to damages to be held before the official referee.

I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal. I have read the evidence of the appellant, and, although it is obviously untrustworthy evidence, it leaves on my mind the same impression which it left on that of the learned judge who heard it—that the solicitor did not consciously intend to defraud his client, but, largely owing to a confused state of mind, believed that he was properly joining with him and guiding him in a good speculation. I cannot, therefore, treat the case, so far as based on intention to deceive, as made out. But where I differ from the learned judges in the courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to treat the action as one of mere negligence at law unconnected with misconduct. This alternative they thought was precluded by the way in which the case had been conducted. I am not sure that, on the pleadings and on the facts proved, they were right even in this. The question might well have been treated as in their discretion and as properly one of costs only, having regard to the unsatisfactory evidence of the appellant. But I do not take the view that they were shut up within the dilemma which they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation. There appears to have been an impression that

A the necessity which recent authorities have established of proving moral fraud in order to succeed in an action of deceit has narrowed the scope of this remedy. For the reasons which I am about to offer your Lordships, I do not think that this is so.

Much of the argument at the Bar turned on the interpretation of what was laid down by this House in *Derry* v. *Peek* (1). It is of importance to be sure of what really was decided in that case. It has been the subject of much comment, both B on what it expressly decided and what has been considered to be implied in the judgments. The facts were these. A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by the Act the company had the right to use steam power. The plaintiff took shares on the faith of this statement. The Board C of Trade afterwards refused their consent to the use of steam power, and the company was wound-up. The plaintiff then brought an action of deceit against the directors, based on the untrue statement. The case was tried in the Chancery Division, before STIRLING, J. He came to the conclusion that the defendants thought that what they had stated was true, inasmuch as they took the consent of the Board of Trade to be a matter of course, and he dismissed the action on the D ground that there was no intention to deceive. The Court of Appeal held that the directors ought to have taken care that they had reasonable grounds for their statement, and that, as they had no reasonable grounds for making it, they were liable, notwithstanding that they had not intended to deceive. This House reversed that judgment, and held that, the action being one of deceit, it was necessary to prove actual fraud. Fraud must be proved by showing that the false repre- E sentation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by showing that it was made under an honest impression that it was true. The discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis F that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must have indeed be taken to have thought that the facts proved as to the relationship of the parties in *Derry* v. *Peek* (1) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty. But they do not say that where a different sort of relationship ought to be inferred from the circumstances, G the case is to be concluded by asking whether an action for deceit will lie. I think that the authorities subsequent to the decision of the House of Lords show a tendency to assume that it was intended to mean more than it did. In reality the judgment covered only a part of the field in which liabilities may arise. There are other obligations besides that of honesty the breach of which may give a right to damages. These obligations depend on principles which the judges have worked H out in the fashion which is characteristic of a system where much of the law has always been judge-made and unwritten.

Even the action on the case for deceit was itself evolved by the judges, as is shown by the dissenting judgment of GROSE, J., in *Pasley* v. *Freeman* (2) so comparatively recently as 1789. Up to that date it was at least doubtful whether the action lay in the absence of a special duty. The doctrines of obligation to exercise I care by persons in particular situations, who are doing acts which may injure the property or persons of others; of implied contract, as shown in the evolution of the action of assumpsit and its development from a case; of the liability of the agent, who came at last to be treated as warranting the authority which he asserted; of the right to an injunction and an account in equity in cases of passing off goods, as explained and contrasted with claims based on deceit in LORD WESTBURY'S judgment in *Edelsten* v. *Edelsten* (3), and in such later authorities as the judgment of FARWELL, J., in *Bourne* v. *Swan and Edgar, Ltd.* (4). These doctrines and the like illustrate the freedom which has been exercised by the judges in making new

applications of recognised principles. Although liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.

The decision of the House of Lords in *Derry* v. *Peek* (1) was applied by the Court of Appeal in another case relating to a prospectus, a case which, like *Derry* v. *Peek* (1), has given rise to comment. In *Angus* v. *Clifford* (5) the directors had affirmed in their prospectus that the reports of certain mining engineers "were prepared for the directors" when they were really prepared for the promoters. The judge who tried the case thought that the directors had not taken proper care as to what they stated, and held them liable, but he did not find that they had made the untrue statements fraudulently as distinguished from carelessly. The Court of Appeal applied the law as laid down in *Derry* v. *Peek* (1). As the judge who tried the case had not found fraud they considered that they could not properly do so, and treated the words used as having been simply passed over by the directors without seeing their importance. This, they thought, amounted to gross and culpable carelessness in the use of language, but not to dishonesty, and they took the view that *Derry* v. *Peek* (1) had decided that there was no legal duty cast upon persons in such a position to take reasonable care in forming their belief. BOWEN, L.J., observed that, while there was nothing new in deciding, as had been done by the House of Lords, that proof of an actual fraudulent mind was necessary to found an action for deceit at common law, the really important step taken was the decision, which he seems to have taken to be of very general application, that there was no duty to be careful in such cases. An honest blunder in the use of language is not dishonest, and unless there is such a duty is not actionable. It is plain that between the grossly careless use of language and the reckless use which will still give a right to succeed in an action for deceit the line of demarcation may seem to plain persons to be very fine. I do not wonder that the decisions in *Derry* v. *Peek* (1) and *Angus* v. *Clifford* (5) have on this point given rise to some heart-burning. But the principle laid down that a mens rea is essential, in the absence of a duty to be careful, was no new one, nor is it now open to question. The difficulty as regards the principle lies in its application to individual cases. It is to the view taken of the facts by the judge of first instance, who has tried the question of fact and decided on which side of the line of demarcation the case lies, that comment should be generally directed, for, though not impossible, it is difficult for a Court of Appeal to review his finding after seeing the witnesses, especially in cases of this class. What requires closer consideration is the generality of the language used in some of the opinions of this House in *Derry* v. *Peek* (1), to the effect that in such a case there is no legal as distinguished from moral duty to be careful. Soon after the decision the legislature, in the Directors' Liability Act, 1890, imposed a statutory obligation on those who issue prospectuses. But in other cases the decision remains binding as to what it really established, and its principle stands.

To what cases, then, does that principle extend? In his opinion LORD HERSCHELL (14 App. Cas. at p. 360) carefully excluded from it

> "those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course."

In such cases, he thought, following what LORD SELBORNE had said in *Brownlie* v.

A *Campbell* (6) (5 App. Cas. at p. 935), that honest belief in the truth of the answer was no defence. This exception was considered by the Court of Appeal, consisting of Lindley, Bowen, and Kay, L.JJ.—the court which had decided *Angus* v. *Clifford* (5)—in *Low* v. *Bouverie* (7). There the defendant, who was trustee of a fund, had replied to the inquiry of a person who contemplated making a loan to a beneficiary on the security of the fund, that the interest of the latter was subject
B to certain incumbrances which he mentioned, but he did not say that there were no others. In fact there were others which he had forgotten. That the defendant was not liable for deceit was clear, but it was contended that as a trustee he was liable for breach of duty to give correct information. But the Court of Appeal held, as I think rightly, that the duty of a trustee did not extend to furnishing answers to inquiries such as were made in the case. Lindley, L.J., said that in
C the absence of such a duty the trustee could not be made liable. Before *Derry* v. *Peek* (1) he observed that it had been generally supposed to have been settled in equity that a person who carelessly, although honestly, made a false representation as to matters within his special knowledge to another about to deal in a matter of business on the faith of the representation, was liable. *Burrowes* v. *Lock* (8) and *Slim* v. *Croucher* (9) were regarded as having laid this down. But *Burrowes* v.
D *Lock* (8) could be supported on the quite different ground of estoppel, that is to say, on the ground that the trustee in that case was precluded from denying that the share in question was unincumbered, as he had asserted this in unambiguous words on the faith of which the plaintiff in the suit had changed his position. It could not be supported on the wider ground. *Slim* v. *Croucher* (9), in which the assertion was that a valid lease would be granted in the future, could not be supported on the
E ground of estoppel, and, as he thought, probably could not be on that of warranty. It must, therefore, in his opinion, be taken to be no longer law. In the case before him, *Low* v. *Bouverie* (7), there was no such precision of statement about the absence of incumbrances as could give rise to estoppel. Lindley and Bowen, L.JJ., concurred in holding that, if there had been a duty to be careful, the case would have been untouched by *Derry* v. *Peek* (1). But they held that as such a
F breach of duty did not exist, and as fraud, warranty, and estoppel were all negatived, there was no liability.

In *Slim* v. *Croucher* (9) the circumstances were unusual, and it may be that the decision can be supported on the ground that the defendant warranted by implication that he had power to grant a valid lease. It is not, however, necessary to express an opinion on the point. But in the appeal before us I do not think that
G any question of warranty or estoppel arises, and if moral fraud has not been established the only question which remains is whether there has been such a breach of duty as gives rise to liability. Now such a duty might arise either at law or in equity; and I do not understand Lord Herschell, who mentioned the case of a legal as distinguished from merely a moral duty, to have intended in any way to exclude duty of which only a court of equity took cognisance. If among
H the great common lawyers who decided *Derry* v. *Peek* (1) there had been present some versed in the practice of the Court of Chancery it may well be that the decision would not have been different, but that more and explicit attention would have been directed to the wide range of the class of cases in which, on the ground of a fiduciary duty, courts of equity gave a remedy.

It is known that in cases of actual fraud the Courts of Chancery and of common
I law exercised a concurrent jurisdiction from the earliest times. For some of these cases the greater freedom which, in early days, the Court of Chancery exercised in admitting the testimony of parties to the proceedings made it a more suitable tribunal. Moreover, its remedies were more elastic. Operating in personam as a court of conscience it could order the defendant, not, indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before the injury. But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in

that court as cases of fraud, yet did not necessarily import the element of dolus malus. The court took it upon itself to prevent a man from acting against the dictates of conscience as defined by the court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done. Common instances of this exclusive jurisdiction are cases arising out of breach of duty by persons standing in a fiduciary relation, such as the solicitor to the client, illustrated by LORD HARDWICKE's judgment in *Earl of Chesterfield* v. *Jansen* (10). I can hardly imagine that those who took part in the decision of *Derry* v. *Peek* (1) imagined that they could be supposed to have cast doubt on the principle of any cases arising under the exclusive jurisdiction of the Court of Chancery. No such case was before the House, which was dealing only with a case of actual fraud as to which the jurisdiction in equity was concurrent. The judgment in *Evans* v. *Bicknell* (11) of LORD ELDON, who not only possessed wide experience of Chancery procedure but had been Chief Justice of the Common Pleas, is instructive as to the character of the equity jurisdiction, especially as far as it is concurrent, and another great judge, SIR WILLIAM GRANT, confirmed his view in *Burrowes* v. *Lock* (8). The latter case can probably be now supported only on the ground of estoppel, but the exposition of the principle of the concurrent jurisdiction remains intact. A similar observation applies to *Slim* v. *Croucher* (9), to which I have already referred. It was not expressly found that there was a duty in breach of which the misrepresentation alleged was made, and there was neither fraud nor estoppel. But the case remains valuable, whatever view may be taken of its result, on account of the exposition of the equity jurisdiction given by LORD CAMPBELL, L.C., and KNIGHT BRUCE and TURNER, L.JJ., judges of great experience. So far as the equity jurisdiction in cases of what is called fraud is concurrent only and exercised in actions for mere deceit apart from breach of special duty, an actual intention to cheat has now to be proved. But there are cases of other classes to which, as I have already said, the Court of Chancery undoubtedly did apply the term fraud, although I think unfortunately. Fraud in such cases is, as JAMES, L.J., said in *Torrance* v. *Bolton* (12) (8 Ch. App. at p. 124)

> "nomen generalissimum, and it must not be construed so as to mislead persons into the notion that contracts for the sale and purchase of lands are in any respect privileged, so as to be free from the ordinary jurisdiction of the court to deal with them as it deals with any instrument, or any other transactions in which the court is of opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained. Indeed, the books are full of cases in which the court has dealt with contracts of that kind—contracts obtained by persons from others over whom they have dominion, contracts obtained by persons in a fiduciary position, contracts for the sale of shares obtained by directors through misrepresentation contained in the prospectus, in respect of which it was never necessary to allege or prove that the directors were wilfully guilty of moral fraud in what they had done."

In Chancery the term "fraud" thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction. What was laid down by Lord Eldon in this House in *Denn d. Bulkley* v. *Wilford* (13) explains the nature of the duty.

I have dealt thus fully with this distinction because I think that confusion has arisen by overlooking it. It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a court of law or a court of equity, in the exercise of concurrent jurisdiction, is dealing with the claim, and in this strict sense it was quite natural that LORD BRAMWELL and LORD HERSCHELL should say that there was no such thing as legal as distinguished from moral fraud. But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A

A man may misconceive the extent of the obligation which a court of equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the B solicitor who makes a bargain with his client which cannot stand, have all for several centuries run the risk of the word "fraudulent" being applied to them. What it really means in this connection is not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court which from the beginning regarded itself as a court of conscience.

Derry v. *Peek* (1) simply illustrates the principle that honesty in the stricter C sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention. If he does so fraudulently, and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the D defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense.

The courts had also power to rescind contracts of many kinds obtained by an innocent misrepresentation, so long at least as the contract had not been superseded by being carried into effect. The condition attached to the plaintiff's right was that he should be able and willing to make restitution in integrum. If so, however free E the defendant might have been from any intention to deceive, he was not allowed to retain what he had obtained from the plaintiff by a material mis-statement on which the latter was entitled to rely as being true. This, like the obligation to be honest, was a principle of general application, which did not depend on any special relationship of the parties or duty arising from it.

But side by side with the enforcement of the duty of universal obligation to be F honest and the principle which gave the right to recission, the courts, and especially the Court of Chancery, had to deal with the other cases to which I have referred, cases raising claims of an essentially different character, which have often been mistaken for actions of deceit. Such claims raise the question whether the circumstances and relations of the parties are such as to give rise to duties of particular obligation which have not been fulfilled. Prior to *Derry* v. *Peek* (1), the G distinction between the different classes of case had not been sharply drawn, and there was some confusion between fraud as descriptive of the dishonest mind of a person who knowingly deceives, and fraud as the term was employed by the Court of Chancery and applied to breach of special duty by a person who erred, not necessarily morally but at all events intellectually, from ignorance of a special duty of which the courts would not allow him to say that he was ignorant. Such H a special duty may arise from the circumstances and relations of the parties. These may give rise to an implied contract at law or to a fiduciary obligation in equity. If such a duty can be inferred in a particular case of a person issuing a prospectus, as, for instance, in the case of directors issuing to the shareholders of the company which they direct a prospectus inviting the subscription by them of further capital, I I do not find in *Derry* v. *Peek* (1) an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care, therefore, gave rise to no cause of action. In other words, it was decided that the directors stood in no fiduciary relation, and, therefore, were under no fiduciary duty to the public to whom they had addressed the invitation to subscribe. I have only to add that the special relationship must, whenever it is alleged, be clearly shown to exist.

The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed on him. In the early history of the action of assumpsit this liability was indeed treated as one for tort. There was a time when in cases of liability for breach of a legal duty of this kind, the Court of Chancery appears to have exercised a concurrent jurisdiction. That was not remarkable, having regard to the defective character of legal remedies in those days. But later on, after the action of assumpsit had become fully developed, I think it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor. The judgment of HALL, V.C., in *British Mutual Investment Co.* v. *Cobbold* (14) is in accordance with this view. This, however, does not end the matter. When, as in the case before us, a solicitor has had financial transactions with his client, and has handled his money to the extent of using it to pay off a mortgage made to himself, or of getting the client to release from his mortgage a property over which the solicitor by such release has obtained further security for a mortgage of his own, a court of equity has always assumed jurisdiction to scrutinise his action. It did not matter that the client would have had a remedy in damages for breach of contract. Courts of equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him. This jurisdiction, which really belonged to the exclusive jurisdiction of the Court of Chancery, had for the client the additional advantage that, as is illustrated by the judgment of LORD HATHERLEY, L.C., in *Burdick* v. *Garrick* (15) the Statute of Limitations would not apply when the person in a confidential relationship had got the property into his hands.

Since the Judicature Act any branch of the court may give both kinds of relief, and can treat what is alleged either as a case of negligence at common law or as one of breach of fiduciary duty. The judgment of JESSEL, M.R., in *Cockburn* v. *Edwards* (16) may, I think, really be regarded as an illustration of the latter jurisdiction. In the case with which we are dealing the statement of claim was framed mainly on the lines of breach of fiduciary duty. This was probably done deliberately in order to endeavour to get over the difficulty occasioned by the Statute of Limitations as regards any mere case of negligence in the original mortgage transaction of 1904. As a consequence fraud has been charged in the peculiar sense in which it was the practice to charge it in Chancery procedure in cases of this kind. But the facts alleged would not the less, if proved, have afforded ground for an action for mere negligence.

I think that NEVILLE, J., was wrong in treating this case as if it were based in substance only on deceit and intention to cheat. No doubt a good deal was said both in argument and in cross-examination which, if established, would have afforded proof of actual fraud. But that was no reason for treating the action as launched wholly on this foundation. It was really an action based on the exclusive jurisdiction of a court of equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence. The judges of the Court of Appeal appear to have taken some such view, with this difference, that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the finding of fact of the judge who tried the case as to the state of mind of the witness. A study of the evidence of the appellant has brought me to the conclusion that NEVILLE, J., was probably right in the conclusion which he reached. I think that the appellant was negligent and rash and regardless of the obligations of his position; I think his evidence utterly untrustworthy; but I cannot agree in holding that NEVILLE, J., has been shown to be wrong in refusing to draw the inference that he intended to cheat. The conclusion at which I have arrived is that this action ought properly to have been

A treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of fiduciary duty or for breach of contract to exercise due care and skill. The main head of claim, that relating to the mortgage of 1904, is barred in equity by the acquiescence of the plaintiff, and at law by the Statute of Limitations. The second head of claim, which is quite sufficiently stated in the pleadings, is not so barred. I am of B opinion that Lord Ashburton was entitled to succeed on this second claim. The proper mode of giving relief might have been to order Mr. Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did. The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only, and is not one which it is necessary to decide. C I am not sure that such an order would have been more merciful to Mr. Nocton than the order for an inquiry as to damages which was actually made. At all events, Mr. Nocton's advisers did not at any time object and ask for the other alternative, and it is too late to ask for it now. There was before us a cross-appeal by the respondent from the decision against him that could not now complain of the transaction in 1904 relative to his mortgage for £65,000. I think that, on the D ground assigned by the Court of Appeal, that claim fails. For the reasons which I have given, and, having regard to the unsatisfactory way in which Mr. Nocton gave his evidence, I think that no injustice has been done by any part of the order under review, and I move that this appeal and the cross-appeal be each dismissed with costs. **LORD ATKINSON** requests me to say that he concurs in this judgment.

E **LORD DUNEDIN.**—This action as originally brought by the respondent, Lord Ashburton, against his quondam solicitor, the appellant, asked for relief in respect of a sum of £65,000 which he had on his advice advanced on mortgage over certain property in Church Street, Kensington. This property, which consisted of land available for building, has been acquired by the appellant from the then owners as a joint speculation on behalf of himself and the Hon. C. Baring, the brother of F the respondent, for a sum of £60,000. The purchase money had been obtained by means of a temporary advance from Parr's Bank. The co-adventurers had then made a sub-sale to the firm of Messrs. Douglas and Holloway, builders, at the price of £80,000. The sub-sale, however, was only valid if certain conditions were fulfilled, the ones material to mention being (i) that the purchaser should be able to obtain a loan of £65,000 on the property; (ii) that they should obtain a loan of G £15,000 from the vendors on mortgage postponed to the £65,000; and (iii) that they should obtain another loan, again postponed, of £47,000. The scheme was that on these sums being advanced the land should be covered by blocks of residential buildings, which should then be let at a ground rent, and the sale of the ground rents would realise sums sufficient to pay off the series of mortgages. It is evident that on the success of the whole scheme depended the chance of the appel- H lant securing his half share of £20,000 profit made by the sale to Douglas and Holloway. The appellant accordingly approached his client, Lord Ashburton, to lend the £65,000 on mortgage on the Church Street property, which he did. Out of the money so received the temporary advance to Parr's Bank was paid off. It should here be explained that as Lord Ashburton had not at the moment £65,000 available, the form which the transaction took was this. He borrowed £75,000 from I the Economic Assurance Co., and as security therefor gave the mortgage aforesaid of £65,000, and also a mortgage over other property of his own, which was valued on behalf of the Economic at £52,400. The ground on which relief was sought was that the appellant had fraudulently induced the respondent to lend the £65,000 by misrepresentations as to the true value of the security. NEVILLE, J., by whom the action was tried, found that the respondent had failed to prove fraud. The Court of Appeal on this main question found that it was unnecessary to consider whether this was right or not. They found that in any case a subsequent communication had been made to Lord Ashburton by the partners of Nocton, with

whom he had come to have differences, which communication either disclosed the whole true state of the facts, or at least put Lord Ashburton on his inquiry, that Lord Ashburton refused to take any steps, and that since that communication the years prescribed by the Statute of Limitations expired before action was brought, and consequently the action was barred. A cross-appeal was taken by Lord Ashburton against this judgment, but was abandoned at your Lordships' Bar. The main question in the action as raised is, therefore, out of the case.

There was, however, a second point in respect of which relief was sought, which necessitates a continuance of the story. The various sums of money above mentioned were all raised, and Douglas and Holloway proceeded to build by means of a sub-contract with a Mr. Johnson, a practical builder. There were to be six blocks of buildings, numbered A to F. Block A was practically completed, and was let at a ground rent of £1,300 per annum; block B was very nearly completed; the others had not been begun when Douglas and Holloway, and Johnson, ran short of money. In the state of the title above mentioned it was obviously impossible to raise any more money by postponed mortgages. It, therefore, occurred to Nocton that the best way to get more money would be, if possible, to get the mortgagees of the £65,000 to release block A from their security. Block A being covered with buildings, and let at a ground rent of £1,300 per annum, would then be an efficient source of credit. As already stated, the legal holder of the £65,000 was the Economic Assurance Co. But the person really most affected by the transaction would be Lord Ashburton, because he had become personally liable to the Economic for £75,000, and had given £52,000 worth of other property in mortgage. Nocton approached the Economic before he approached Lord Ashburton. He did so by a letter of Nov. 16, 1905, in which he set out the state of matters, and proposed that the society should release block A. The letter contained the following sentence:

> "We have no doubt that Lord Ashburton will agree to the proposals, but before communicating with him upon the subject we desire to know whether your society will agree to them."

The society replied that any agreement on their part must be subject to their receiving a favourable report from their own surveyor, Mr. Vigers, and stipulated that Nocton's clients should pay Vigers' fee. To this Nocton assented, and the society instructed Vigers to report. The result was that on Dec. 4 Nocton received a letter from the secretary of the society in the following terms:

> "I have now received a satisfactory report from Mr. Vigers, and I have to inform you that we consent to the release of block A from our security."

On Dec. 9, 1905, Nocton sent the following letter to Lord Ashburton:

> "Dear Lord Ashburton,—for the purpose of financing the building upon the Church Street, Kensington, site which will be known as 'York House' it is necessary that the first lot of flats which are known as 'block A' should be released from the mortgage. The Economic Life Assurance Society have agreed to release it from their mortgage, and I am now writing to ask you to release it from your mortgage. The necessary deed is being prepared in anticipation of your consent, and will be ready for signature very shortly. The Economic Society sent their surveyor Mr. Robert Vigers to look at the property with a view to testing the security before they consented to release it. This, I think you will agree with me, is very satisfactory—Yours very faithfully, W. Nocton."

On Jan. 1, 1906, Nocton sent the release to Lord Ashburton, who signed it. It is not denied that the only information given to Lord Ashburton at this time was that contained in the said letter of Dec. 9, 1905.

I pause for a moment before examining what the relief actually claimed was, to consider the facts as they stand at this point. I have no hesitation in saying that the letter of Dec. 9 was grossly misleading. It assumes that the question of

release for the Economic is identical with the question for Lord Ashburton, and it refers to the report of Mr. Vigers in such terms as clearly to convey the idea that Vigers, if employed for Lord Ashburton, would have said that the remanent security after the release of block A was sufficient. Now, Nocton knew perfectly well that the question for the Economic was a prefectly different one from that for Lord Ashburton, because the Economic, so far as their debt was concerned, had the additional security of £52,000 worth of Lord Ashburton's other property. It will not do to say that if Lord Ashburton had remembered each of the individual facts of which he was cognisant at the time of the original transaction more than eighteen months before he could have pieced out for himself the true state of matters. No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction. But besides that Nocton was in a fiduciary position. He was Lord Ashburton's solicitor, advising him as to the very transaction which he was himself proposing, and his position was, so to speak, aggravated by the fact that he himself was interested in the transaction going through, and that in a double sense; first, because the direct effect of the release of block A from the £65,000 mortgage was to raise the position of the £15,000 mortgage held by Nocton and Baring to that of a first mortgage quoad that block; and, secondly, because, as already said, the ultimate success of the whole scheme was essential to the realisation of the £20,000 profit by Nocton and Baring. In such a state of facts, I think it not doubtful that the plaintiff ought to have a remedy, nor in any system in which law and equity were not separated would there, I think, any difficulty arise. I will venture to go further and say that, in my opinion, one of the objects of the legislation of 1873 was to prevent such difficulties arising in the law of England.

Viewing the matter as I must do, as under the rules of the law of England, the question which at once arises is: Was the remedy of the plaintiff at law or in equity, or had he a remedy in both? As I understand the matter, if the action had been brought at law under the old system it could have been based either (i) on fraud, or (ii) on negligence, and the relief in either case would have been damages. But if based on fraud, then, in accordance with the decision in *Derry* v. *Peek* (1) the fraud proved must be actual fraud, a mens rea, an intention to deceive. It is an action of deceit. It is the case that the plaintiff here did aver fraud—he said that the things done and omitted to be done by the defendant in the part which he took in advising the release were fraudulently done and omitted to be done. NEVILLE, J., held that the mens rea had not been proved, and, fraud being in the forefront of the pleadings, he held himself not entitled to treat the action as one for negligence. Further, fraud in the sense of mens rea not being proved, he held that the doctrine of *Derry* v. *Peek* (1) was as fully applicable to relief in equity as it was to relief at law. The Court of Appeal held that the behaviour of the appellant in this matter of the release was fraudulent, and granted relief in the shape of damages accordingly. They found on the facts that there was negligence, but assumed that, fraud being in the forefront of the pleadings, mere negligence could not be inquired into. In the words of the Master of the Rolls:

> "It would be wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based upon negligence."

Holding fraud proved, it became unnecessary for them to consider whether there was in default of law any equitable remedy to meet the situation.

Turning now to equity, here again, as I understand the situation, there was a concurrent jurisdiction in equity to keep persons in a fiduciary capacity up to their duty. The matter has been exhaustively dealt with by the Lord Chancellor, and I do not propose to examine the cases. I will only make a few remarks. In the first place, it will be found that the word "fraud" in the older cases in Chancery is often used where the thing so characterised is a wrongful breach of

duty, without a consideration of whether there is such a mens rea as would found an action for deceit. In the second place all the cases are based upon the existence of a fiduciary relationship, and subsequently the breach of duty arising. Now, whenever we come to the idea of breach of duty we see how nearly the domains of law and equity approach, or, perhaps, more strictly speaking, overlap. Take the word negligence—the culpa of the Roman jurists. There can be no negligence unless there is a duty. That duty may arise in many ways. There are certain duties which all owe to the world at large, alterum non lædere is one. So the man who leaves a loaded gun in a public place is liable for the accident ensuing, though it is not he that pulls the trigger. The common law gives a remedy. Then there are the duties which arise from contract, of which the solicitor's position gives an example—spondet peritiam artis—he contracts to be professionally qualified and to be careful. Here again the common law will give an action for negligence. And then there are the duties which arise from a relationship without the intervention of contract in the ordinary sense of the term, such as the duties of a trustee to his cestui que trust or a guardian to his ward. It is in these latter class of cases that equity has been peculiarly dominant, not, I take it, from any scientific distinction between the classes of duty existing and the breaches thereof, but simply because in certain cases where common justice demanded a remedy the common law had none forthcoming, and the common law (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right.

If, then, we turn to the solicitor's position we may look at it in two aspects, which is not to look at two different things, but to look at the same thing from two different points of view. He has contracted to be diligent: he is negligent. Law will give a remedy. It may well be that if a bill had been filed with a bold statement to the effect above, there might have been a demurrer for want of equity. He has not contracted that all representations made by him, if not negligently made, shall be true; and consequently, fraud apart, he cannot, on the law of *Derry* v. *Peek* (1) be answerable at law for his representation. But from the other point of view he has put himself in a fiduciary position, and that fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client. He fails to do so. Equity will give a remedy to the client. This it does quite apart from the doctrine of *Derry* v. *Peek* (1), for in that case there was no fiduciary relationship, and the action had to be based on the representation alone.

Returning now to the pleadings in the present case, the case as originally launched, seeking for relief as to the £65,000, was undoubtedly based on fraud. That fact tinged the form of the pleadings. That part of the case is gone; but the Court of Appeal thought that it dominated the pleadings as to the relief in respect of the release of block A. It was held in *Archbold* v. *Charitable Bequests for Ireland Comrs.* (17), *Thom* v. *Bigland* (18), and *Swinfen* v. *Lord Chelmsford* (19), that if on striking out the allegations of fraud a cause of action still remains, the action may proceed. I should myself have been prepared so to read the statement of claim as to show an averment of negligence even when the averments of fraud are struck out. In that case, as NEVILLE, J., says: "I think that Mr. Nocton fell far short of his duty which he owed to the plaintiff as solicitor." And as the Court of Appeal held that the action, if based on negligence, was practically undefended, it would have been unnecessary to consider, as the Court of Appeal did, whether the fraud which NEVILLE, J., had held not proved was proved. But apart from that, for the reasons given by the Lord Chancellor, I think there was here a remedy in equity for breach of duty. I agree that the form which that remedy would have taken would not have been damages, but looking to the course which the case has taken, I do not think it incumbent on us to alter the remedy to another which would practically come to much the same. I, accordingly, agree with the motion made by my noble and learned friend.

LORD SHAW.—I agree with the conclusion reached by the Lord Chancellor and to the judgment proposed. It would have been satisfactory to my mind to have had the judgment of the Court of Appeal upon the merits of the question now being determined by this House. Owing to the view taken by that court, however, upon the question of fraud it became unnecessary for their Lordships to deal with the case on any other footing. Fraud was negatived by NEVILLE, J., and the Court of Appeal has affirmed it. I humbly agree with NEVILLE, J., and with your Lordships that fraud was not established against the appellant.

I am of opinion that the facts as they appear from the evidence stand thus. The appellant and the respondent were both experienced and sanguine speculators in land. Lord Ashburton was as astute as the other. I still retain some doubt whether, if his co-speculator and solicitor, the appellant, had put all the then available facts correctly before him, he, the respondent, would not have taken the risk of going on with the speculation on the terms proposed. But I admit that this is in the realm of conjecture, and I am willing to assent to the view of your Lordships that the likelihood is the other way. As, however, to the conduct of Mr. Nocton, his cardinal error is intelligible. He allowed the idea of his relations to Lord Ashburton as co-speculator to obscure the view which he ought steadily to have kept before him of Lord Ashburton as his client. The appellant was interested to the extent of a moiety of a mortgage of £15,000 over the properties. For my own part, I do not believe that it ever occurred to him, in proposing the release of block A, one of the mortgaged properties, that the effect of that transaction would be to give the £15,000 a position of priority which it would not otherwise have obtained. I think further that upon the point of valuation Mr. Nocton was himself quite assured in his own mind that the valuation obtained from Messrs. Hamnett was sufficient and might be treated as equivalent to a separate valuation made up to date and for mortgagee's purpose. There are many other elements in the case which suggest to me that he did not intend on any occasion to defraud his client, but that most of his conduct now called in question arose from the fact that he was, with regard to these properties and at the time of these transactions, in a confused, somewhat hustled, and very anxious state of mind.

I now turn to the pleadings. They do appear to me to contain averment sufficiently clear of the following facts—that block A was the most valuable part of the respondent's security when the same was released; that the remainder was insufficient as a security for the existing mortgage of £65,000; that the respondent was approached by the appellant in order to have block A released from his security; and I also read the averment as if none of the motive or inducement or suggestion of the transaction ever came from the respondent to the appellant, but on the contrary proceeded from the appellant to the respondent. The pleadings still further aver that the appellant advised the respondent that he would still have sufficient security and that a valuation or valuations showed this, whereas in point in fact this was not so. It is finally alleged that the respondent, in executing the release, had no independent advice, that he acted solely upon that proffered to him by the appellant, and that the appellant was himself interested in the property and in the obtaining of the release in the sense already mentioned. Stating the averments thus, they appear to me to lay the basis of, and to give due notice of, a claim for liability upon a ground quite independent of fraud, namely, of misrepresentations and mis-statements made by a person entrusted with a duty to another, and in failure of that duty. I have stated what is found in the pleadings, purposely deleting from them the allegations of fraud which they contain. I think that with those allegations of fraud deleted there was quite sufficient left in the pleadings for the determination of the case as is now being done by this House.

I incline to the view that prior to the passing of the Supreme Court of Judicature Act, 1873, this is a course which would have been taken in a court of equity. In *Hickson* v. *Lombard* (20), L.R. 1 H.L. at p. 331, LORD CHELMSFORD, L.C., refers with approval to

"the principle explained by LORD COTTENHAM in *Archbold* v. *Charitable Bequests for Ireland Comrs.* (17), that where a bill alleges matters of fraud and all the subsequent considerations depend on those matters, which are not proved, the court must necessarily dismiss the bill, 'but if fraud be imputed and other matters alleged which will give the court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as under the circumstances the plaintiff may be entitled to.' "

There is indeed in the present case a good deal to remind one of the observation of POLLOCK, C.B., in *Swinfen* v. *Lord Chelmsford* (19) (5 H. & N. at p. 920):

"If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, though both be alleged, and may recover upon the liability which the facts disclose, though fraud and malice be disproved, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences whether done wilfully or not."

I need not pursue the later cases giving effect to the same view, but approaching the whole case as I do from an independent standpoint, I should have learned with surprise that, especially since the passing of the Supreme Court of Judicature Act, 1873, this salutary rule of practice had been departed from, and I am relieved to think that the difficulty on the pleadings to which I have referred which influenced the judgment of NEVILLE, J., does not seem serious to your Lordships.

Addressing myself to the merits of the case, I approach it in this respect differing to some extent from the line along which some of your Lordships have advanced—by suggesting that the first consideration in these cases ought always to be: What was the relation in which the parties stood to each other at the time of the transaction in respect of which the claim for damages, compensation, or restitution is made? In the answer to that question, in my judgment, may be found a solution of not a few of the difficulties which arise in such actions. LINDLEY, L.J., in *Low* v. *Bouverie* (7), compendiously indicated the lines on which liability might be founded as fraud, breach of duty, warranty and estoppel. With regard to fraud, I do not believe that it occurred in this case; the action is not founded on warranty; and in the view which I take of it the safer and less complicated method of viewing this case is not as one of estoppel but as one of alleged breach of duty. I, accordingly, repeat the question as to what were the relations of the parties here. Mr. Nocton was a solicitor; Lord Ashburton was his client. Mr. Nocton became responsible for statements that there had been a valuation and that there was sufficient margin in the remainder of the property to secure the existing debt, and that the release was accordingly a safe and sound transaction. He was also, as a matter of fact, personally interested, and he profited as a co-speculator by the transaction of release; and I am of opinion that the duty of Mr. Nocton was, in view of this fact, to decline to act professionally or as the adviser of his client and to insist that a separate solicitor should be obtained: *Bank of Montreal* v. *Stuart* (21). But in the whole circumstances mentioned every step taken by the solicitor which subsequent disclosures show to have been out of accord with fact became for him a step of danger, a danger of liability if through the erroneous step the client is misled and the loss accrues.

Once the relation of parties has been so placed, it becomes manifest that liability upon the part of an adviser upon whom rests the duty of doing things or making statements by which the other is guided or upon which that other justly relies, can and does arise irrespective of whether the information and advice given have been tendered innocently or with a fraudulent intent. I am well aware of the fact that *Derry* v. *Peek* (1) is in some quarters thought to have introduced a far-reaching change into the law. But if the question be approached from the

point of view which I have stated—namely, of first ascertaining the relations which the parties bore to each other, then much assistance may be derived on the point—which is a vital point—as to what are the conditions and restrictions under and within which the supposed new rule of *Derry* v. *Peek* (1) can be held to operate. Does, in short, *Derry* v. *Peek* (1) cover the ground? I do not go further for this caution than *Derry* v. *Peek* (1) itself. In the previous history of the law, as, for instance, in *Burrowes* v. *Lock* (8), and in certain expressions in *Brownlie* v. *Campbell* (6), the principle had been over and over again enunciated, but in *Derry* v. *Peek* (1) LORD HERSCHELL gathers them together in these expressions (14 App. Cas. at p. 360):

> "There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance which he has given. *Burrowes* v. *Lock* (8) may be cited as an example, where a trustee had been asked by an intended lender upon the security of a trust fund whether notice of any prior incumbrances upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action."

The fact that the principle here set out was not held to cover the case of a company director holding out representations to the investing public—this fact, no doubt, led to the acceptance of *Derry* v. *Peek* (1) in certain quarters under protest. When LORD HERSCHELL said (14 App. Cas. at p. 376):

> "I think those who put before the public a prospectus to induce them to embark their money into a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea,"

he may have seemed to be giving an apt illustration of the general rule of liability to make good an assurance given. But it appeared it was not so; the decision was the other way, and this position was only changed by Parliament in the Directors Liability Act, 1890. And it should not be forgotten that *Derry* v. *Peek* (1) was an action wholly and solely of deceit, founded wholly and solely on fraud, was treated by this House on that footing alone, and that this being so what was decided was that fraud must ex necessitate contain the element of actual moral delinquency. Certain expressions by learned lords may seem to have made incursions into the region of negligence, but *Derry* v. *Peek* (1) as a decision was directed to the single and specific point just set out. But, although the principle was not applied to the position of directors, the principle itself was not abandoned, but was, as has been mentioned, distinctly enunciated.

With regard to dicta subsequent to *Derry* v. *Peek* (1) and bearing upon that case, I venture to repeat the observation of LORD BOWEN in *Lowe* v. *Bouverie* (7). He said that *Derry* v. *Peek* (1)

> "decides . . . that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful, not to give information except after careful inquiry. In *Derry* v. *Peek* (1) the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that if the duty is assumed to exist there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty such as the law recognises to be careful."

There is a passage, my Lords, in an argument used by SIR ROUNDELL PALMER in *Peek* v. *Gurney* (22) (L.Rep. 13 Eq. at p. 97) which may well afford guidance as to the antecedent state of the law of equity.

> "Equity will interfere only in the following cases: First, wherever a contract is to be rescinded; secondly, where fraud in the proper sense of the word is to be redressed; thirdly, where a representation has been made which binds the conscience of the party and estops and obliges him to make it good. In the last case the representation in equity is equivalent to a contract and very nearly coincides with the warranty at law, and in order that a person may avail himself of relief founded on it he must show that there was such approximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other."

These principles still remain.

I purposely avoid the term "estoppel," but the principle to be found running through this branch of the law is, in my opinion, this. Once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given, not fraudulently, but in good faith. It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I, accordingly, think that the situation is plainly open for the application of the principle of liability to which I have referred—namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that that duty should be fulfilled.

LORD PARMOOR stated the facts and continued: The question of fraud cannot be determined apart from the oral evidence, and I am not prepared to differ from NEVILLE, J., who negatived the charge after hearing at length the evidence of both the appellant and the respondent, stating that, in his opinion, the evidence had fallen far short of proof of such a charge. The question remains to be considered whether, in the absence of mens rea, the appellant is liable to the respondent. It is practically admitted that the appellant, in advising the respondent, did not use the skill and care required of a solicitor, and that in the transaction which resulted in the release of block A from the mortgage he committed a breach of duty rendering him liable in negligence, quite apart from fraudulent intention. NEVILLE, J., stated his opinion that the appellant fell far short of the duty which he owed to the respondent as a solicitor, and the Master of the Rolls says that, if the respondent had claimed damages on the ground of negligence, the action would have been practically undefended as to the part of the case not barred by statutory limitation. NEVILLE, J., held, however, after careful consideration of the statement of claim, that fraud had been definitely alleged in connection with the whole story, and that he would not be acting with justice if he were to divide the case, and treat part of the action as severable from the rest, and consider whether, on the grounds other than the alleged ground of fraud, he should be right in giving relief against the appellant. The same view was expressed in the Court of Appeal, but it was less material, since the Court of Appeal found fraud against the appellant. It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute barred. The question, therefore, arises in a simple form whether the pleadings raise sufficiently a charge of negligence. Turning first to the claim, it deals with the whole transaction, and not separately with the release of block A, and asks for a declaration

that the respondent was improperly advised and instructed by the appellant while acting as his confidential solicitor to advance to Douglas and Holloway the sum of £65,000 upon the security mentioned. No doubt, it does directly allege fraud in connection with the release of block A, but if all the allegations directly imputing fraud are excluded, sufficient remains on which to furnish a charge of negligence or breach of duty of the appellant in his employment as a solicitor. It does not appear to me that there would be any injustice to the appellant in dealing with the action as one of negligence or breach of duty. The same evidence would have been required whether the action had been founded on negligence or fraud, and the defence would have been conducted in either case on the same lines. In my opinion, the judgment of the Court of Appeal should be affirmed, without costs, but the appellant is absolved from the charge of fraud.

Appeal and cross-appeal dismissed.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley*, for *Frederick Hall*, Folkestone; *H. S. Knight-Gregson.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

DIRECTOR OF PUBLIC PROSECUTIONS *v.* CHRISTIE

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Moulton, Lord Parker of Waddington and Lord Reading) February 26, 27, April 7, 1914]

[Reported [1914] A.C. 545; 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141]

Criminal Law—Evidence—Statement made in presence of accused—Description of alleged offence—Denial of guilt by accused—Identification—Res gestae—Statement made after, but not immediately after, alleged offence.

At the trial of the respondent on a charge of indecently assaulting a boy aged five years, the mother of the boy stated in evidence that at about 10 a.m. he left her, and that she next saw him about 10.30 a.m. After describing his then condition, she stated that she took him across the fields, and there saw a man with whom she had a conversation, and the respondent was then fetched. She was asked whether the boy said anything in the presence and hearing of the respondent; she answered in the affirmative, and objection was raised to the admission in evidence of the conversation. Her evidence was then interrupted and the boy was called. He related the story of the assault, and when asked by counsel if he could see the man in court who committed it, he pointed to the respondent. Counsel for the defence did not cross-examine. The evidence of the mother was then resumed, and she was again asked whether the boy said anything in the respondent's presence. Counsel for the defence again objected, and argued upon the authority of the Court of Criminal Appeal in *R.* v. *Norton* (1) that the evidence was not admissible, inasmuch as the respondent had denied the statement made in his presence. The deputy chairman was aware from the depositions of the nature of the statement and of the respondent's answer to it. The evidence was admitted. The mother then stated that, as she and the boy were going towards the respondent, the boy said: "That is the man, mum." Crooks, a police constable, was standing close to the respondent, and asked: "What man?" The

boy went up close to the respondent and said: "That is the old man, mum," and proceeded to give a description of the acts done by Christie, who replied: "I am innocent." Police Constable Crooks, when called, said that the boy, in answer to the question: "Which is the man?", went up to the respondent, touched him on the sleeve, and said: "That is the man." The police constable asked: "What did he do to you?" and the boy then gave an account of the various acts done by the respondent, who answered: "I am innocent, I have been asleep in the fields since eight o'clock last night." The only cross-examination was to elicit a repetition of the statement: "I am innocent."

Held: (i) the evidence of the boy's mother and of the police officer that the boy said: "That is the man" when he touched the prisoner's sleeve was admissible as being so closely connected with the act of identification as to be part of it; (ii) the evidence of those witnesses regarding the boy's statement when asked what the prisoner had done to him was also admissible although the prisoner denied that it was true, for there was no rule of law that evidence could not be given of an accused person being charged with an offence and of his behaviour when hearing the charge where that behaviour amounted to a denial of his guilt (*R.* v. *Norton* (1), [1910] 2 K.B. 496, criticised and doubted), but the evidential value of the behaviour of the accused where he denied the charge was very small, either for or against him, whereas the effect on the minds of the jury of his being charged to his face with the crime might seriously prejudice the trial, and the judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he suggested to the prosecution that the evidence should not be admitted; (iii) the evidence was not admissible as being part of the res gestae because it was not of something which the boy stated while the offence was being committed or immediately thereafter.

Notes. Applied: *Chantler* v. *Bromley* (1921), 14 B.W.C.C. 14. Considered: *Davies* v. *D.P.P.*, [1954] 1 All E.R. 507. Referred to: *R.* v. *Curnock* (1914), 111 L.T. 816; *Perkins* v. *Jeffery*, post, p. 172; *R.* v. *Smith*, post, p. 262; *R.* v. *Bovy* (1916), 12 Cr. App. Rep. 15; *R.* v. *Feigenbaum*, [1918–19] All E.R.Rep. 489; *R.* v. *Adams* (1922), 17 Cr. App. Rep. 77; *R.* v. *Cole* (1941), 165 L.T. 125; *R.* v. *Keeling*, [1942] 1 All E.R. 507; *R.* v. *Hughes* (1949), 33 Cr. App. Rep. 59; *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044; *Teper* v. *R.*, [1952] 2 All E.R. 447.

As to evidence of statements made in the presence of the defendant and as part of the res gestae, see 10 Halsbury's Laws (3rd Edn.) 440–442, 475, 476; and for cases see 14 Digest (Repl.) 401 et seq.

Cases referred to:

(1) *R.* v. *Norton*, [1910] 2 K.B. 496; 79 L.J.K.B. 756; 102 L.T. 926; 74 J.P. 375; 26 T.L.R. 550; 54 Sol. Jo. 602; 5 Cr. App. Rep. 65, C.C.A.; 14 Digest (Repl.) 447, *4332*.

(2) *R.* v. *Lillyman*, [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 44 W.R. 654; 12 T.L.R. 473; 40 Sol. Jo. 584; 18 Cox, C.C. 346, C.C.R.; 14 Digest (Repl.) 453, *4390*.

(3) *R.* v. *Atwood and Robbins* (1788), 1 Leach, 464; 14 Digest (Repl.) 534, *5182*.

(4) *Re Meunier*, [1894] 2 Q.B. 415; 63 L.J.M.C. 198; 71 L.T. 403; 42 W.R. 637; 18 Cox, C.C. 15; 10 R. 400, D.C.; 14 Digest (Repl.) 535, *5193*.

(5) *R.* v. *Stubbs* (1855), Dears. C.C. 555; 25 L.J.M.C. 16; 26 L.T.O.S. 109; 19 J.P. 760; 1 Jur.N.S. 1115; 4 W.R. 85; 7 Cox, C.C. 48, C.C.R.; 14 Digest (Repl.) 535, *5191*.

(6) *R.* v. *Boyes* (1861), 1 B. & S. 311; 30 L.J.Q.B. 301; 5 L.T. 147; 25 J.P. 789; 7 Jur.N.S. 1158; 9 Cox, C.C. 32; 121 E.R. 730; 14 Digest (Repl.) 528, *5126*.

(7) *Thompson* v. *Trevanion* (1693), Holt, K.B. 286; Skin. 402; 90 E.R. 1057, N.P.; 14 Digest (Repl.) 450, *4367*.

(8) *R.* v. *Bedingfield* (1879), 14 Cox, C.C. 341; 14 Digest (Repl.) 451, *4370.*
(9) *R.* v. *Foster* (1834), 6 C. & P. 325; 14 Digest (Repl.) 451, *4368.*
(10) *R.* v. *Lunny* (1854), 6 Cox, C.C. 477; 14 Digest (Repl.) 451, **2835.*
(11) *R.* v. *Wilson, Lewis and Harvard* (1911), 6 Cr. App. Rep. 125, C.C.A.; 14 Digest (Repl.) 539, *5234.*
(12) *R.* v. *Blatherwick* (1911), 6 Cr. App. Rep. 281, C.C.A.; 14 Digest (Repl.) 533, *5179.*
(13) *R.* v. *Welsh* (1862), 3 F. & F. 275; 14 Digest (Repl.) 448, *4353.*
(14) *R.* v. *Smith* (1897), 61 J.P. 120; 18 Cox, C.C. 470; 14 Digest (Repl.) 448, *4354.*
(15) *R.* v. *Thompson*, [1910] 1 K.B. 640; 79 L.J.K.B. 321; 102 L.T. 257; 74 J.P. 176; 26 T.L.R. 252; 22 Cox, C.C. 299; 4 Cr. App. Rep. 45, C.C.A.; 14 Digest (Repl.) 448, *4357.*
(16) *R.* v. *Wainwright* (1875), 13 Cox, C.C. 171; 14 Digest (Repl.) 317, *3047.*
(17) *R.* v. *Pook* (1871), 13 Cox, C.C. 172, n.; 14 Digest (Repl.) 450, *4365.*

Also referred to in argument:
R. v. *Rowland* (1898), 62 J.P. 459; 14 Digest (Repl.) 453, *4391.*
R. v. *Wood* (1877), 14 Cox, C.C. 46; 14 Digest (Repl.) 453, *4389.*
R. v. *Hedges* (1909), 3 Cr. App. Rep. 262, C.C.A.; 15 Digest (Repl.) 1014, *9993.*
R. v. *Osborne* (1842), Car. & M. 622; 14 Digest (Repl.) 453, *4384.*
R. v. *Goddard* (1882), 15 Cox, C.C. 7; 14 Digest (Repl.) 451, *4371.*
R. v. *Nicholas* (1846), 2 Car. & Kir. 246; 2 Cox, C.C. 136; 14 Digest (Repl.) 453, *4392.*

Appeal by the Director of Public Prosecutions from a decision of the Court of Criminal Appeal (SIR RUFUS ISAACS, C.J., DARLING, J., and ATKIN, J.) quashing a conviction of the respondent at the Middlesex Quarter Sessions on a charge of indecently assaulting a boy aged five years.

The Attorney-General (*Sir John Simon, K.C.*), *Branson, Comyns Carr,* and *Purchase* for the Director.

Dickens, K.C., and *Bryan* for the respondent.

Their Lordships took time for consideration.

April 1, 1914. **VISCOUNT HALDANE, L.C.**—I concur in the opinions which are about to be expressed by LORD ATKINSON, LORD MOULTON, and LORD READING. The only point upon which I desire to guard myself is as to the admissibility of the statement in question as evidence of identification, for the boy gave evidence at the trial, and if his evidence was required for the identification of the prisoner, that evidence ought, in my opinion, to have been his direct evidence in the witness-box, and not evidence of what he had said elsewhere. On that point I share the doubt which I understand LORD MOULTON will express.

The following opinions were then read.

LORD ATKINSON.—This is an appeal from an order of the Court of Criminal Appeal, dated Oct. 27, 1913, whereby the conviction of the present respondent under s. 62 of the Offences against the Person Act, 1861, [see now Sexual Offences Act, 1956, s. 15 (1) (2)] for indecently assaulting a boy named Frederick Butcher, of about five years of age, was quashed, and a verdict and judgment of acquittal directed to be entered upon the indictment upon which he had been convicted. The accused was then discharged from custody. The Attorney-General stated that there was no intention of re-arresting him, whatever the result of this appeal might be.

The questions of law arising on the appeal are: (i) Whether a certain statement made by this boy Butcher in the presence and hearing of the accused and of a police constable was properly admitted in evidence; and (ii) whether, the child having been permitted under the powers of s. 30 of the Children Act, 1908, [now Children and Young Persons Act, 1933, s. 38] by the deputy chairman of the

Middlesex Quarter Sessions, before whom the case was tried, to give evidence without being sworn, this judge had misdirected the jury by telling them that the statement so made by the boy in the presence of the accused was, within the meaning of that section, material evidence implicating the accused, in corroboration of the boy's testimony given at the trial.

The little boy when examined as a witness proved what had been done to him, and identified the prisoner as the person who had done it, but was not asked any questions, and did not give any evidence, in reference to any previous identification of the accused by him, nor refer to any statement previously made by him in the presence of the accused. He was not cross-examined upon his evidence of identification given at the trial. The boy's mother, Mrs. Charlotte Butcher, and Constable William Crooks were examined. The latter proved that he was stationed at Edmonton, and that, having received certain information, he went to a field off Winchester Road, saw a number of people, including the prisoner, Mrs. Butcher, and her son standing there; that she made a complaint to him (the constable) that a man had assaulted her son, that he then asked the boy which was the man, whereupon the boy went up to the accused, touched him upon the sleeve of his coat, and said: "That is the man"; that he (the constable) then asked the boy: "What did he do to you?" In reply to which question the boy made a statement giving full particulars of the offence charged. The Attorney-General contended that the entire statement of the boy was admissible on each of four separate grounds: (i) As part of the act, of identification, or as explanatory of it. (ii) As a statement made in the presence of the prisoner in circumstances calling for some denial or explanation from him, the truth of which he admitted by his conduct and demeanour. (iii) As proof of the consistency of the boy's conduct before he was examined with the testimony given by him at the trial. (iv) As part of the res gestæ. Your Lordships intimated during the course of the argument that you would not consider this third point. It is, therefore, unnecessary to allude to it further. Of course, it will suffice for the Attorney-General's purpose if the statement be admissible on any of these grounds. It is, I think, clear that the principle laid down in *R.* v. *Lillyman* (2), and in those cases which followed, has no application to the present case. In these cases it was decided that in rape and other sexual crimes committed against women, the statement of the prosecutrix made in the absence of the accused in the form of a complaint, immediately or soon after the commission of the offence, is admissible in evidence, even though the full details of the crime be stated. In *R.* v. *Lillyman* (2) consent was immaterial on the charge in the first count of the indictment, upon which alone the prisoner was convicted, though it was material on some of the other counts. It is admitted that such a statement is no evidence against the accused of the facts stated. There is some conflict between the authorities as to the particular grounds upon which such statements are admitted, but I think the general result of the cases is that the complaint is only admissible to negative consent. It is to be remembered that statements admitted under heads (i) and (iv) are not, as against the accused, affirmative evidence of the facts stated, but only of the knowledge of, or the belief in, those facts by the person who makes the statement, or of his intention in respect of them. They must, of course, in order to be admissible, be relevant to the issue, the guilt of the accused of the offence charged against him.

As to the first point, it cannot, I think, be open to doubt that, if the boy had said nothing more, as he touched the sleeve of the coat of the accused, than: "That is the man," the statement was so closely connected with the act which it accompanied, expressing, indeed, as it did, in words little if anything more than would have been implied by the gesture simpliciter, that it should have been admitted as part of the very act of identification itself. It is on the admissibility of the further statement made in answer to the question of the constable that the controversy arises. On the whole, I am of opinion that this statement only amplifies what is implied by the words "That is the man," plus the act of touching him. A charge had been made against the accused of the offence committed on

A the boy. The words "that is the man" must mean "that is the man who has done to me the thing of which he is accused." To give the details of the charge is merely to expand and express in words what is implied in the act of identification. I think, therefore, that the entire statement was admissible on these grounds, even although the boy was not asked at the trial anything about the former identification.

As to the second ground, the rule of law undoubtedly is that a statement made B in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the C case to determine whether his words, action, conduct, or demeanour at the time when a statement is made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknow- D ledgment may be inferred by them. Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, he can instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, E could not or would not rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it his own in whole or in part, F or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above mentioned should be ultimately produced, to tell the jury to disregard the statement altogether? In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice. The course suggested by G Pickford, J., in *R.* v. *Norton* (1) ([1910] 2 K.B. at p. 500), where workable, would be quite unobjectionable in itself as a rule of practice, and equally effective for the protection of the accused. The course pursued when accomplices are examined as witnesses is very analogous to that suggested. It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid: *R.* v. *Atwood and Robbins* (3); *Re Meunier* (4); H but it is a general rule of practice that judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, and this is a matter entirely for the discretion of the judge before whom a case is tried: *R.* v. *Stubbs* (5); *R.* v. *Boyes* (6). Again, if two persons are jointly indicted and tried together, the statements made by each are generally only evidence against him who makes them. Under certain circumstances they may be evidence against both, but if I they be only evidence against him who makes them, injustice to the other accused is guarded against by the presiding judge telling the jury that this is so. There is no sufficient reason, I think, to suppose that injustice to the accused could not be effectually guarded against by the judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own.

The boy's statement was so separated by time and circumstance from the actual commission of the crime that it was not, I think, admissible as part of the res gestæ. In *Thompson* v. *Trevanion* (7), tried before Holt, C.J., sitting at nisi

prius, it was held that what a woman said immediately on a hurt being received by her and before she had time to contrive anything for her own advantage, might be given in evidence. The rule is here stated to rest on the absence of time or opportunity for concoction. In *R.* v. *Bedingfield* (8) a woman rushed out of a room with her throat cut almost through, made a statement to some women she met, and expired in a very short time. Her husband was found in this room with his throat cut also. The question at issue was murder or suicide. COCKBURN, C.J., said the woman's statement was not admissible,

> "for it was not part of anything done or something said while something was being done, but something said after something done. It is not as if, while being in the room and while the act was being done, she had said something which was heard."

In other cases, such as *R.* v. *Foster* (9) and *R.* v. *Lunny* (10), the rule was applied with less strictness. I have found no authority, however, which would justify the admission of any part of the boy's statement as part of the res gestæ.

Even, however, if the boy's statement was admissible in evidence if properly dealt with, I think the verdict should be quashed. The deputy chairman never explained properly to the jury that it is what the accused accepts as his own of the statement made in his presence that is evidence against him, not the statement itself. Again, he treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of s. 30 of the Children Act, 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or on cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more "material corroborative evidence in support of his evidence at the trial implicating the accused" than his would be. The appeal, so far as it is directed to reverse the decision appealed from, should, I think, be dismissed, although the Crown have succeeded on the point as to the admissibility in evidence of the statement. I have been requested by my noble and learned friend **LORD PARKER** to express his concurrence in this judgment.

LORD MOULTON.—The evidence admitted in this case, the admissibility of which is the question raised by the appeal, consists of the statements of more than one witness as to one and the same event—namely, that which passed on the occasion when the little boy on whom the assault is alleged to have been committed came into the presence of the prisoner almost immediately after that assault is alleged to have taken place. For the purpose of considering the point it will suffice to take the evidence of one of these witnesses, inasmuch as the same point is involved in each case. I will, therefore, select the evidence given by the boy's mother. She says that she took the boy back to the field where the prisoner was standing and that he said in the prisoner's presence, pointing him out: "That is the man." The constable then asked, "Which man?" and the boy went up and touched the prisoner and said: "That is the old man who did so and so" (giving particulars of the assault). The prisoner said: "I am innocent."

The admission of this evidence has been defended on three grounds: (i) That it was evidence of identification of the prisoner by the boy; (ii) that it was a statement made in the presence of the prisoner coupled with evidence of his behaviour on hearing the statement; and (iii) that it was relevant to the issue of "consistent complaint," and, therefore, admissible in the case of an offence such as an indecent assault committed on a small child. I do not propose to deal with the third ground because it is not necessary to do so for the purpose of deciding this appeal, and it raises very difficult questions which would be better decided in some case where the admission of the evidence turns directly on the point. I

A shall, therefore, confine myself to the first and second of the above grounds. They do not depend in any way on the youth of the person making the statement, and the issue is, therefore, free from the complications which might arise from the fact that he was a child of tender years.

Speaking for myself, I have great difficulty in seeing how this evidence is admissible on the ground that it is part of the evidence of identification. To B prove identification of the prisoner by a person, who is, I shall assume, an adult, it is necessary to call that person as a witness. Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called C as a witness and was not called to prove by direct evidence that he had thus identified him. Such a mode of proving identification would, in my opinion, be to use secondary evidence where primary evidence was obtainable, and this is contrary to the spirit of the English rules of evidence.

There remains the second ground—namely, that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. In a D civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. E The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intima- F tion from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for anyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure. It is alleged on the part of the respondent that an instance G of this is the case of the accused being charged with the crime and denying it or not admitting it. It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the crime, and H I cannot agree that the admissibility or non-admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charge, the evidence is obviously relevant. If he denies it, it may or may not be relevant. For instance, if he is charged with a violent assault and denies that he committed it, that fact might I be distinctly relevant if at the trial his defence was that he did, but that it was in self-defence. The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that someone makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be

given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt. This is said to have been laid down as a rule of law in *R.* v. *Norton* (1), and to have been followed by the courts since that decision. If this be so, I think that the decision was wrong, but I am by no means convinced that it was intended in that case to lay down any such rule of law.

But while I am of opinion that there is no such rule of law, I am of opinion that the evidential value of the behaviour of the accused where he denies the charge is very small either for or against him, whereas the effect on the minds of the jury of his being publicly or repeatedly charged to his face with the crime might seriously prejudice the fairness of his trial. In my opinion, therefore, a judge would in most cases be acting in accordance with the best traditions of our criminal procedure if he exercised the influence which he rightly possesses over the conduct of a prosecution in order to prevent such evidence being given in cases where it would have very little or no evidential value. Subject to these words of caution, I am of opinion that this appeal should be allowed on this point, because we have to decide upon the admissibility as a matter of law, and so regarded I have no doubt that the evidence in question was rightly admitted. I think, however, that the direction as to corroboration was wrong, and that, therefore, the conviction should not stand.

LORD READING, C.J.—The Attorney-General submitted that this evidence was admissible, first, because it was part of the act of identification by the boy; secondly, because it was a statement made in the hearing and presence of Christie which had a bearing upon his conduct and demeanour at the time of hearing it; thirdly, because it proved that the boy's conduct after the offence was committed and before he gave evidence was consistent with the statements made by him at the trial; and, fourthly, because it was part of the res gestæ. During the argument your Lordships intimated that it was not convenient on this appeal to consider the third ground, and there was no further discussion upon it.

As to the first ground. No objection was raised by counsel for the respondent to the admission of the first part of the statement, namely, "That is the man." It implied that Christie was the man designated by the boy as the person who had committed the offence, and meant little, if anything, more than the act of touching the sleeve of Christie or pointing to him. The importance is as to the admission of the additional words, describing the various acts done by Christie. These were not necessary to complete the identification or to explain it. There was no dispute that in the presence of his mother and the police constable the boy designated Christie as the man who had committed the offence. According to the constable's evidence, the additional statement was made in answer to his question to the boy: "What did he do to you?" At the trial, and before the statement was admitted, the boy identified Christie in court, and was not cross-examined. The additional statement was not required by the prosecution for the purpose of proving the act of identification by the boy. The statement cannot, in my judgment, be admitted as evidence of the state of the boy's mind when in the act of identifying Christie, as that would amount to allowing another person to give in evidence the boy's state of mind, when he was not asked, and had not said anything about it in his statement to the court. If the prosecution required the evidence as part of the act of identification it should have been given by the boy before the prosecution closed their case. In my judgment, it would be a dangerous extension of the law regulating the admissibility of evidence if your Lordships were to allow proof of statements made, narrating or describing the events constituting the offence, on the ground that they form part of or explain the act of identification, more particularly when such evidence is not necessary to prove the act, and is not given by the person who made the statement. I have found no case in which any such statement has been admitted.

As to the second ground. A statement made in the presence of one of the

parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. And equally such a statement made in the presence of the accused may be given in evidence against him at his trial. The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the crimnal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of judges to juries strongly warning them not to act upon the evidence of an accomplice unless it is corroborated: see *R.* v. *Stubbs* (5); *R.* v. *Boyes* (6); *Re Meunier* (4); *R.* v. *Wilson, Lewis and Harvard* (11); *R.* v. *Blatherwick* (12). Such a practice has also long existed in reference to the admissibility in evidence of a statement as that now under consideration: see *R.* v. *Welsh* (13), and *R.* v. *Smith* (14), per Hawkins, J., which the Court of Criminal Appeal refused to follow as a rule of law in *R.* v. *Thompson* (15). Such practice has found its place in the administration of the criminal law because judges are aware from their experience that in order to ensure a fair trial for the accused and to prevent the operation of indirect, but not the less serious, prejudice to his interests, it is desirable in certain circumstances to relax the strict application of the law of evidence.

Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and might indirectly operate seriously to the prejudice of the accused, should not be given against him, and speaking generally counsel accepts the suggestion and does not press for the admission of the evidence unless he has good reason for it. That there is danger that the accused may be indirectly prejudiced by the admission of such a statement as in this case is manifest, for, however carefully the judge may direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement.

In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from which the jury could infer such an acknowledgment, for if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether. In *R.* v. *Norton* (1) Pickford, J., in delivering the judgment of the Court of Criminal Appeal, said ([1910] 2 K.B. at p. 500):

> "If there be no such evidence [of acknowledgment by the accused] then the contents of the statement should be excluded; if there be such evidence, then they should be admitted."

If it was intended to lay down rules of law to be applied whenever such a statement is tendered for admission, I think the judgment goes too far; they are valuable rules for the guidance of those presiding at trials of criminal cases when considering how the discretion of the court, with regard to the admission of such evidence, should be exercised, but it must not be assumed that the judgment in *R.* v. *Norton* (1) exhausts all the circumstances which may have to be taken into consideration by the court when exercising its judicial discretion. It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in

the particular case, notwithstanding that it did not amount either to an acknowledgment of any part of the truth of the statement. I think it impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred. Upon the whole, therefore, I come to the conclusion that the rules formulated in *R.* v. *Norton* (1), and followed in this and other cases, must be restricted in their application as above indicated, and cannot be regarded as strict rules of law regulating the admissibility of such evidence. I think, therefore, that this statement was in law admissible as evidence against Christie.

As to the fourth point. The statement under review formed no part of the incidents constituting the offence. It was not made while the offence was being committed or immediately thereafter. It took place after Christie had left the boy, and the mother had found him and taken him across the fields and had spoken to another man. In my view, it was not so immediately connected with the act of assault as to form part of the res gestæ. In the words of COCKBURN, C.J., in *R.* v. *Bedingfield* (8):

> "It was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard."

This ruling was given at the trial of an indictment for the murder of a woman when it was sought by the prosecution to give in evidence as part of the res gestæ a statement made by the deceased. It appeared that she, with her throat cut, came suddenly out of the house, and pointing backwards to the house, made a statement to two women whom she employed. She had left the prisoner in the house, and his throat was also cut. She succumbed to the injuries within a few minutes after making the statement. COCKBURN, C.J., refused to admit the statement, giving his decision in the words above quoted. Later he said: "It was something stated by her after it was all over, whatever it was, and after the act was completed." See also COCKBURN, C.J., in *R.* v. *Wainwright* (16), and BOVILL, C.J., in *R.* v. *Pook* (17). In *Thompson* v. *Trevanion* (7) HOLT, C.J., held in a civil action that a statement by a woman immediately upon receiving the hurt in question in the action, and, as the report says, "before that she had time to devise or contrive anything for her own advantage, might be given in evidence." The decision rests upon the ground that the statement was made immediately upon receiving the injury. *R.* v. *Foster* (9) is another instance of a statement made immediately after the event. There evidence was admitted of a statement as to the cause of the accident made by the deceased at the instant of receiving the injury. In *R.* v. *Lunny* (10), at a trial for murder, a girl heard a cry and then found the deceased, weak and injured, who made a statement immediately on her coming up to him. MONAHAN, C.J., admitted it as part of the res gestæ. In this case the rule as to admissibility seems not to have been so rigidly enforced, but neither that case nor any of the authorities would support the admission of the statement in the case now before us.

Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed. The Court of Criminal Appeal acted upon the authority of *R.* v. *Norton* (1) and did not think it necessary to consider any further point in the appeal. By virtue of s. 30 of the Children Act, 1908, Christie could not be convicted unless the boy's testimony was "corroborated by some other material evidence in support thereof implicating the accused." There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable, as corroboration of the boy's evidence implicating the accused. This is manifestly wrong. It was for the deputy chairman to satisfy himself that there was evidence of corroboration fit to be submitted to the jury within the meaning

of the statute, and then to direct them not to convict unless they accepted the evidence of corroboration. He did not give this direction, and, therefore, notwithstanding the view I have expressed about *R.* v. *Norton* (1) and of the admissibility of the boy's statement in this case, I am of opinion that the conviction was rightly quashed, and that the appeal should be dismissed. I have been requested by **LORD DUNEDIN** to say that he concurs in this judgment.

Solicitors: *Director of Public Prosecutions; Avery Son & Fairbairn.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

STICKNEY *v.* KEEBLE AND ANOTHER

[House of Lords (Earl Loreburn, Lord Atkinson, Lord Mersey, Lord Parker of Waddington and Lord Parmoor), November 3, 4, 12 and December 11, 1914.]

[Reported [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664]

Sale of Land—Contract—Time of performance—Time of the essence—Right to equitable relief of party in breach of term as to time—Discretion of court—Time made of the essence by notice after delay—Effect of Supreme Court of Judicature Act, 1873 (36 & 37 *Vict.*, *c.* 66), *s.* 25 (7).

The date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief against a breach of that term of the contract where a party seeks to make an unfair use of the letter of his contract in this respect. The granting of this relief is discretionary; it will always be refused when to grant it would be essentially unfair. It will be granted where a court of equity, looking, not at the letter but at the substance, of a contract to purchase land, sees that neither by the express stipulation of the contracting parties, the nature of the property, or the circumstances of the case is an intention disclosed that the time limited for completion, or for any step towards completion, is to be strictly adhered to, provided that that can be done without substantial injustice. The vendor's conduct may disentitle him to relief; in order to ascertain whether he is so disentitled his conduct both before and after the date fixed for completion must be considered. The purchaser's conduct is also relevant, for a delay by a vendor without remonstrance from the purchaser is far from having the same effect as a similar delay in spite of such remonstrance. Time may become of the essence of the contract where a vendor has been guilty of unnecessary delay and the purchaser serves him with a notice limiting a reasonable time at the expiration of which he will treat the contract as at an end.

By s. 25(7) of the Supreme Court of Judicature Act, 1873 (18 Halsbury's Statutes (2nd Edn.) 467): "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

Held: in considering whether it will apply this subsection and give relief in an action on a contract the court should take into account all the circumstances proved up to the date of judgment and not merely consider whether at the date of the institution of the action time would in equity have been considered of the essence; the section has no application if it be established that

prior to the Act of 1873 equity would not under the then existing circumstances have granted specific performance to the defendant or restrained the action.

Notes. Section 25 (7) of the Supreme Court of Judicature Act, 1873, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, and has been replaced by s. 41 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427) which is in slightly different terms.

Applied: *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915), 32 T.L.R. 156. Considered: *Re Sandwell Park Colliery Co., Field* v. *The Co.*, [1928] All E.R.Rep. 651; *Lock* v. *Bell*, [1930] All E.R.Rep. 635; *Harold Wood Brick Co.* v. *Ferris*, [1935] All E.R.Rep. 603; *Charles Rickards, Ltd.* v. *Oppenheim*, [1950] 1 All E.R. 420. Referred: *Re Bayley and Shoesmith's Contract* (1918), 87 L.J.Ch. 626; *Bernard* v. *Williams*, [1928] All E.R.Rep. 698; *Pincott* v. *Moorstons, Ltd.* (1936), 80 Sol. Jo. 207; *Wallington* v. *Townsend*, [1939] 2 All E.R. 225; *James Macara, Ltd.* v. *Barclay*, [1944] 2 All E.R. 589; *Finkielkraut* v. *Monohan*, [1949] 2 All E.R. 234; *Williams* v. *Greatrex*, [1956] 3 All E.R. 705; *Aberfoyle Plantations, Ltd.* v. *Cheng*, [1959] 3 All E.R. 910.

As to stipulations regarding time in contracts generally, see 8 HALSBURY'S LAWS (3rd Edn.) 164–166, and as to contracts for the sale of land, see ibid., vol. 34, pp. 256, 257. For cases see 12 DIGEST (Repl.) 346 et seq., and 40 DIGEST (Repl.) 117–121.

Cases referred to:

(1) *Roberts* v. *Berry* (1853), 3 De G.M. & G. 284; 22 L.J.Ch. 398; 20 L.T.O.S. 215; 43 E.R. 112, L.JJ.; 40 Digest (Repl.) 87, *659*.
(2) *Tilley* v. *Thomas* (1867), 3 Ch. App. 61; 17 L.T. 422; 32 J.P. 180; 16 W.R. 166, L.JJ.; 40 Digest (Repl.) 118, *924*.
(3) *Lennon* v. *Napper* (1802), 2 Sch. & Lef. 682; 40 Digest (Repl.) 143, **626*.
(4) *Noble* v. *Edwardes*, *Edwardes* v. *Noble* (1877), 5 Ch.D. 378; 37 L.T. 7, C.A.; 40 Digest (Repl.) 283, *2354*.
(5) *Wilde* v. *Fort* (1812), 4 Taunt. 334; 128 E.R. 359; 40 Digest 90, *675*.
(6) *Howe* v. *Smith* (1884), 27 Ch.D. 89; 53 L.J.Ch. 1055; 50 L.T. 573; 48 J.P. 773; 32 W.R. 802, C.A.; 40 Digest (Repl.) 241, *2027*.
(7) *Lloyd* v. *Collett* (1793), 4 Bro.C.C. 469; 4 Ves. 689, n.; 29 E.R. 992, L.C.; 40 Digest (Repl.) 253, *2123*.
(8) *MacBryde* v. *Weekes* (1856), 22 Beav. 533; 28 L.T.O.S. 135; 2 Jur.N.S. 918; 52 E.R. 1214; 12 Digest (Repl.) 351, *2720*.

Appeal from a decision of the Court of Appeal, reversing a judgment of JOYCE, J., in an action by a purchaser of land to recover his deposit.

The question for decision was whether or not the appellant, who had agreed to purchase a farm from the respondents under an agreement for sale in which the time fixed for completion was Oct. 11, 1911, was justified, in the circumstances, in giving notice on Jan. 30, 1912, to the respondents that, unless the sale was completed on or before Feb. 13, 1912, the appellant would treat the agreement for the sale as abandoned, and would insist on the return of his deposit.

By an agreement in writing dated June 8, 1911, the appellant Alfred Henry Stickney contracted to purchase from the respondents certain freehold lands forming part of the Wawne Estate, near Hull, containing 612 acres for £20,200, of which sum £2,020 should be paid immediately as a deposit and the balance on Oct. 11, 1911. The appellant was a farmer who was giving up his farm and desired to purchase one for occupation in its stead and possession by a certain date was therefore of importance to him, and this was known to the vendors. The estate had been purchased by the respondents Keeble and Jellett for £84,000 as a speculation, and they hoped to pay Major Windham, who sold as tenant for life under the Settled Land Acts, the purchase money by selling the land in plots to different purchasers.

By the agreement the purchase was to be completed by Oct. 11, 1911, and vacant possession given the appellant on April 6, 1912.

The purchase was not completed on Oct. 11, 1911, and after a considerable amount of correspondence, in which the purchaser complained of the delay and pressed for completion, he gave, on Jan. 30, 1912, a final notice to the respondents that unless the purchase was completed on or before Feb. 13, 1912, he would treat the contract as at an end, and demand the return of his deposit.

The purchase was not completed on the day named, and on Feb. 15 the appellant issued a writ claiming that he was entitled to treat the contract as at an end, and demanding the return of his deposit with interest and damages.

On Feb. 17 the respondents sold the land to another purchaser.

JOYCE, J., was of opinion that the defendants had been guilty of unreasonable delay, and that in the circumstances the time allowed by the notice of Jan. 30 was not unreasonably short. Accordingly he gave judgment for the plaintiff for the return of the deposit.

The Court of Appeal (LORD COZENS-HARDY, M.R., BUCKLEY and HAMILTON, L.JJ.), differing from JOYCE, J., on the facts, reversed his decision on the second point and entered judgment for the defendants.

The plaintiff appealed.

P. O. Lawrence, *K.C.*, and *Percy Wheeler* for the appellant.
Hughes, *K.C.*, *Younger*, *K.C.*, and *W. R. Sheldon* for the respondents.

Their Lordships took time for consideration.

Dec. 11, 1914. The following opinions were read.

EARL LOREBURN.—This case turns on the view which the House may take of the facts, though it is also necessary to say something about the law. It is an action by a purchaser of some 612 acres of land against his vendors to recover the deposit, upon the ground that after a long delay he gave notice to complete in a fortnight, and the vendors failed to complete. JOYCE, J., held that he was entitled to recover the deposit. This decision was reversed by the Court of Appeal, who thought that the notice did not, in the circumstances, allow sufficient time. I agree with the judgment of JOYCE, J., but in view of the decided opinion expressed by the Court of Appeal feel it my duty to examine the facts.

Mr. Stickney, the purchaser, was a farmer who intended to quit his farm in April, 1912. Accordingly, on June 8, 1911, he contracted to buy from Messrs. Keeble and Jellett, the present respondents, these 612 acres. The purchase money was £20,200. The contract named Oct. 11, 1911, as the day for completion. A deposit of 10 per cent. was paid. It was known to the vendors that the purchaser required the land for farming, and April 6, 1912, was the day for giving vacant possession. It is common ground that the purchaser would require to enter before that date for ploughing and other purposes. It was not reasonable that Mr. Stickney should lay out large sums with a view to taking vacant possession in April, 1912, until he could feel certain that his purchase would be completed in good time. Both sides knew that undue delay would be very injurious to him. It is right to state at the outset that the purchaser, Mr. Stickney, was throughout able and willing to carry out his contract. He could and would have completed on Oct. 11. His solicitor says so, and no witness contradicts him. There is a suggestion about the source from which he was to borrow money, and which I regard as groundless. No one suggests that he was guilty of any delay or default. All that is said is that in the end his notice to complete did not allow sufficient time.

I now turn to Messrs. Keeble and Jellett, the vendors. These gentlemen were not the legal owners of the land which they contracted to sell. In April, 1911, they had contracted to buy from the tenant for life, Major Windham, a large property called the Wawne estate, with a view to re-sale. Part of it was the 612 acres sold to Mr. Stickney. In all there were twenty-three such re-sales. Messrs. Keeble and Jellett had no conveyance to themselves, and had not approved the title,

or even received an abstract, in June, 1911. The Wawne estate was mortgaged, different mortgages affecting different parts of it, and there were some charges affecting parts of it. Also, there were no effective trustees for the purposes of the Settled Land Acts. All this, no doubt, may be usual enough, and no real difficulty at any time arose in regard to the title. The importance of it is that when Messrs. Keeble and Jellett sold to Mr. Stickney they had a good deal to do before they could get a title themselves. As they had twenty-three sub-sales, which they intended to carry through by direct conveyances from Major Windham, and to complete all on the same day so as to apply the money they received in paying the money which they would owe, it was obvious that a good deal of work had to be got through on their side, and a good deal of coming and going, before everything was well over.

The view I take of the facts in this case may be put in a sentence. Mr. Stickney was anxious to pay his money and take his land, but his vendors delayed him again and again, because they wanted time to carry through their own engagements with Major Windham and with their twenty-three sub-purchasers so as to complete the whole thing, or as much as possible of it, on the same day. That is my view of the facts, and my view of the law is that Mr. Stickney was not bound to accept that as a justification for delay. Delay so caused must be imputed to Messrs. Keeble and Jellett, not to Mr. Stickney, who was not concerned with the other sub-purchasers.

Let me state briefly why I take this view of the facts. The contractual day for completion, Oct. 11, 1911, passed without notice on either side. Between that date and Nov. 14 Mr. Stickney, through his solicitors, complained that there was delay.

Messrs. Keeble and Jellett, through their solicitors, were getting trustees appointed and conveyances prepared. Whether they and the other sub-purchasers and Major Windham's solicitors were leisurely or not I do not know. But on Nov. 14 Mr. Stickney gave his first notice that he would cancel the purchase unless it was completed in three weeks. This, however, was waived. On Dec. 12 it was admitted that so far as Mr. Stickney's purchase was concerned every question of title was settled between him and his vendors. On that day he gave a second notice that he would cancel unless his purchase was completed on or before Jan. 12, 1912. An entire month was thus allowed, but Jan. 12 passed and Messrs. Keeble and Jellett had not settled with Major Windham and their other sub-purchasers. Mr. Stickney again waived his rights under the notice. He was becoming impatient, not without reason, when his own position is considered. On Jan. 16 his solicitors asked Messrs. Keeble and Jellett's solicitors if there were any questions as to title outstanding between them and Major Windham. The answer sent on Jan. 17 stated that only one question was outstanding, relating to the repair of a river bank, and that this could be dealt with after completion. In fact I think it did not affect the lands bought by Mr. Stickney. Another letter was written by Mr. Stickney's solicitors bitterly complaining of delay, without producing any result, and on Jan. 30 they gave the notice which the Court of Appeal held to be unreasonable, that they would cancel unless Messrs. Keeble and Jellett completed on or before Feb. 13. It was their third notice of the kind. This January notice left fourteen days for the vendors to prepare themselves. When I am asked to say that this time was insufficient I must see what had to be done within it. The draft conveyance had to be approved by the mortgagee's solicitors, Messrs. Bull and Bull. It had also to be engrossed and executed by eight persons living in Essex, Kent, Hull, London, Buckinghamshire, Wawne, Andover, and Peterborough. First, take the obtaining of Messrs. Bull and Bull's approval. That ought, so far as Mr. Stickney's draft was concerned, to have been done long before. This draft was received by Messrs. Keeble and Jellett's solicitors and forwarded by them to Major Windham's solicitors on Dec. 21, 1911, with a request to forward it to Messrs. Bull and Bull. This was not done till Jan. 30, and then

A it was forwarded with some of the other draft conveyances to the other sub-purchasers. Messrs. Bull and Bull did not approve it till Feb. 7. On Feb. 8 it was received by Mr. Stickney's solicitors approved. They had it engrossed instantly, and on Feb. 9 it was in the possession of Messrs. Keeble and Jellett's solicitors. Only four days were left before Feb. 13 to obtain the execution of the eight persons living in the places I have named. That was a short time. If it was B too short a time, that was not the fault of Mr. Stickney. It was because others failed to procure the necessary approval in time. Am I to say that what otherwise would have been a reasonable time to get the deed executed by eight persons becomes unreasonable because the vendors or other persons for whom they are responsible have been occupied on other matters for a month or six weeks, and so left more to be done within the time fixed by the notice? If that were accepted, C then the more lax a vendor is, the longer is the time which must be allowed him by the purchaser. With all respect I must decline that view. In my opinion, the fourteen days allowed for the notice were sufficient if Messrs. Bull and Bull's approval had been obtained to this draft in time. I am not prepared to say it was unreasonable under the circumstances, even if time had to be allowed for getting Messrs. Bull and Bull's approval, though it would have been a tight fit. People who are D behind time in the transaction of business must expect such pressure. It was admittedly not a reasonable time to complete all the twenty-three purchases, or even the eighteen or nineteen of them which were, in fact, concluded on Feb. 23. But Mr. Stickney was not bound to await the convenience of his vendors in carrying out their transactions with other people, unless he had either agreed to do so or led his vendors to believe that he would do so by his own statements E or by his own conduct. In the end the respondents' argument resolved itself into a contention that Mr. Stickney had, in fact, led the vendors to believe this, and that they had acted upon this belief. That also is the substance of the judgments delivered in the Court of Appeal, as I read them. I cannot assent to this contention.

[HIS LORDSHIP examined the evidence and stated his reasons for coming to his F conclusion of fact, and continued:] In regard to the law I shall say very little, because it is fully dealt with in the opinion of LORD PARKER, which I have had the advantage of seeing in print. I will merely observe that the date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect, having regard to the state of the law G relating to real property in England. The granting of this relief is discretionary. But it is safe to say that this relief will always be refused when to grant it would be essentially unfair. In the view I take of the facts, and this is why I have somewhat closely examined the facts, it would be essentially unfair that in this case the vendors who, either by themselves or by those for whose action they alone are chargeable against the purchaser, have caused great delay in completion, should H be enabled to forfeit the deposit of a purchaser against whom no one has attempted to make good any delay whatever. I have not expressed nor, indeed, formed any opinion on the question whether or not the time taken by the solicitors for the vendors, or the tenant for life, or the mortgagees, or the sub-purchasers other than Mr. Stickney, was too long in the circumstances for what they had to do, I because I do not know what difficulties they may have encountered in carrying through rather a large piece of business. What I am satisfied about is that Mr. Stickney's piece of business was in fact unjustifiably delayed by what occurred, and that he was in no sense bound to wait because others did not or could not make progress. I think this appeal should be allowed.

LORD ATKINSON.—I concur. It is unnecessary to re-state the facts. The respondents' contention is that, time not having been made of the essence of this contract by the express stipulation of the contracting parties, the nature of the

property, or the circumstances of the case, the notice given to them by the appellant on Jan. 31, 1912, is ineffectual to make it so, inasmuch as the time allowed by it to the respondents to do all that remained to be done by them was, under all the circumstances of the case, unreasonably short. The appellant, to the knowledge of the respondents, bought the land for the purpose of working it as a farm. He was to go in full possession and enjoyment of it on April 7, 1912, and I am by no means sure that time was not of the essence of the contract to this extent, at all events, that the purchase should be completed at such a time before that date as would leave an interval reasonably sufficient for the preparations necessary to enable him to so enter upon the land and use it. This point, however, was not fully dealt with in the evidence, and I pass it by.

There is no occult or elusive mystery hidden in the phrase, "in equity time is not of the essence of the contract." It merely expresses in a condensed form the doctrine that where a court of equity, looking, not at the letter but at the substance, of a contract to purchase land, sees that in none of the three ways above mentioned is an intention disclosed that the time limited for completion, or for any step towards completion, is to be strictly adhered to, it will relieve against breaches of the contract through mere lapses of time touching these matters, when that can be done without substantial injustice: *Roberts* v. *Berry* (1). The jurisdiction exercised by a court of equity in this matter is very much akin to that exercised by it in relieving against forfeitures, or in permitting the redemption of mortgages after the estate of the mortgagee has, according to the letter of his contract, become absolute at law. In *Tilley* v. *Thomas* (2) Lord Cairns and Rolt, L.J., deal with the doctrine thus. Lord Cairns says (3 Ch. App at p. 6):

> "The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a court of law. A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties. And if (as Turner, L.J., said in *Robert* v. *Berry* (1)) 'there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract."

Rolt, L.J., says (ibid. at p. 69):

> "Now as a matter of construction merely I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the court to give relief against the breach, and, sometimes, even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law though not necessarily so in equity. The language of Lord Redesdale in *Lennon* v. *Napper* (3) and cited by Knight Bruce, L.J., in *Robert* v. *Berry* (1) fully explains my view on this part of the case."

In that case the defendants purchased a house for a residence, possessor (i.e., possession with a good title) had to be delivered to him on a certain day, and it was held that these circumstances showed that it was the intention of the parties that

A time should be of the essence of the contract and the bill of the vendor for specific performance was dismissed.

Again, at law if a vendor of land who on the contract being repudiated by the purchaser on the day named for completion, sued for damages for breach of contract, he would have been obliged to aver and prove that he was on that day ready and willing to convey, which involves that he had a good title on that day. B If he could not do this, he could not sue, because he could not do that which is a condition precedent to the performance of the contract by the purchaser: see JAMES, L.J., in *Noble* v. *Edwardes* (4), 5 Ch.D. at p. 393. Similarly, if the vendor of an estate should not have a clear title by the day specified, the purchaser may at law rescind the contract and recover back his deposit, without waiting to see whether the vendor may ultimately be able to establish a good title: *Wilde* v. *Fort* (5). C Section 25 (7) of the Supreme Court of Judicature Act, 1873 [see now Law of Property Act, 1925, s. 41], has a bearing on this authority and was relied on.

In *Howe* v. *Smith* (6) the purchaser on entering into the contract paid £500 as a deposit and in part payment of the purchase money. The contract contained a condition very similar to condition No. 15 in the present case. The purchaser was guilty of so many delays as to amount to virtual repudiation of his contract. The D vendor, on June 20, 1880, warned the purchaser that unless he completed within a month the vendor would sell the property. On July 25 the purchaser instituted a suit for specific performance of the contract. On July 31 the vendor, before he had delivered a defence justifying a rescission of the contract, resold the property to a third person at the original price. The Court of Appeal held that the purchaser was not entitled to a decree for specific performance, but allowed the E statement of claim to be amended by adding a claim for a return of the deposit, ultimately, however, the court held that, notwithstanding that the deposit was to be taken in part payment of the contract when completed, it was also a guarantee for the due performance of the contract, and that as the purchaser was in default the resale gave him no rights, and he could not recover back his deposit. FRY, L.J., alone among the learned lords justices dealt with the question whether under s. 25 F (7) of the Supreme Court of Judicature Act, 1873, the rule of law, as distinguished from the rule in equity, still prevails (27 Ch.D. at p. 103) and came to the conclusion that the effect of the subsection is that a purchaser seeking damages need no longer prove his readiness and willingness to complete on the day named, but may still recover if he can prove his readiness and willingness to complete within a reasonable time after that day. The same rule would, of course, apply to the G case of a vendor suing for damages. If this decision be right, as I am inclined to think it is, the law laid down in *Tilley* v. *Thomas* (2) and in *Noble* v. *Edwardes* (4) is to this extent modified.

I feel myself quite unable to assent to the two propositions following, which, as I understood, were laid down by counsel for the respondents. (i) That no matter how distant the day may be which is fixed for completion by the parties to a H contract for the sale and purchase of land—though, indeed, it be measured by years—a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone. (ii) That where no time for completion is fixed in the contract, and the law imports into it a provision that it is to be completed in a reasonable time, this reasonable time I is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running. If I misunderstood him, I apologise. I think the authorities I have cited show that these propositions are untenable.

Counsel for the respondents put his contention, as I understood him, thus. There was, he said, an understanding between the parties, not amounting to a contract because made without consideration, but definite and clear, that the purchaser should procure the purchase money and the contract for sale should be completed

in a certain way, namely, that the appellant would wait for completion until the vendors were ready to complete with their other purchasers for which preparations had been made, and that it was unreasonable and unfair on the part of the appellant to require that that mode of procedure should be abandoned, and the purchase completed in a wholly different way, for which few, if any, preparations had been made, in the short period of fourteen days. I am not quite sure that he did not contend further that if the mode of procedure first contemplated was not followed, the purchaser should in this case be held to have been unable to find the purchase money, and, therefore, unable to complete. JOYCE, J., was of opinion that, if the mode of procedure so alleged to have been understood and assented to by the plaintiff was to be followed, the time given for completion was unreasonably short. The Court of Appeal agreed with him. I myself see no reason to dissent from that view; but the Court of Appeal went further, and, as I understand their judgments, held that the appellant had assented to the contract being carried out in the way alleged to have been arranged, and that it was because he had done so that his notice requiring his own purchase to be completed within fourteen days, irrespective of the completion of all the other contracts of purchase, was unreasonable. It is in this last conclusion I am, with all respect, quite unable to concur. I do not think there is any satisfactory evidence whatever that the appellant ever came to any understanding such as is suggested, amounting either to this, that he would not require his agreement to be completed before the agreements of all the other sub-purchases, twenty to twenty-five in number, were completed, no matter how long that operation might take or to this, that the completion of the appellant's purchase was to be postponed till a reasonable time for the completion of all the other contracts had elapsed.

[HIS LORDSHIP referred to the evidence and concluded:]

On the whole, therefore, I am of opinion that the appellant has not been in any way in default. He has waited for four months to have his contract carried out. During that long period he has been, at once, patient and pressing. There was much delay, but that was not due to him or to anything he did or for which he is responsible. It is due, I think, in the main to this, that the respondents sold, as owners, property that did not belong to them, property that they had, no doubt, agreed to buy, but had not the money to pay for, money which they could only obtain from the sub-purchasers of the estate as their contracts of purchase were completed. It would, in my view, be quite unjust to allow the respondents to retain money deposited as a guarantee for the due performance of the very contract which they themselves, not the depositor, have failed to perform. As in *Howe* v. *Smith* (6) the purchaser who was in default could not get back his deposit because of his default, so here the vendors, who are in default, should not be permitted to retain the deposit since they were in default. I concur with JOYCE, J., in thinking that the fourteen days allowed by the notice of Jan. 30 was quite a reasonable time for the completion of the appellant's own contract, independently of the others, and am of opinion that the decision of that learned judge was right, and should be upheld, that the decision of the Court of Appeal was erroneous and should be reversed, and this appeal allowed with costs, here and below.

LORD MERSEY concurred, saying that he had read the opinions pronounced and about to be pronounced by the other noble and learned Lords who had heard the appeal, and that he entirely agreed with them.

LORD PARKER.—In a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title. In such cases, however, equity having a concurrent jurisdiction did not look upon

A the stipulation as to times in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the B essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed shall be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract. It should be C observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.

This is an action by a purchaser for return of his deposit and other relief, based D upon the failure by the vendor to observe the stipulation as to the date of completion, and it will, I think, tend to simplicity if the matter be first considered irrespective of the changes introduced by the Judicature Acts. Prior to these Acts the vendor could have only obtained relief from the consequences of his failure by filing a bill for specific performance and for an injunction restraining the action. On such a bill he could have obtained no relief unless he were himself E able and willing to make a title to the purchaser. It appears, however, that almost immediately after the institution of the action the vendor had put it out of his power to complete the sale by reselling the property to a third party, and under these circumstances there could be no question of specific performance, and, therefore, no injunction restraining the action. It seems F to me that on this ground alone the bill must have failed. An injunction, if granted, would not have been incident to, and in aid of, the equitable remedy of specific performance, but a means of enabling the vendor to forfeit the purchaser's deposit—in other words, to exercise a right which, if it existed at all, was a legal right, and this would be contrary to the principles upon which the Court of Chancery has always acted. Counsel for the respondents in effect ad- G mitted this, but relied on s. 25 (7) of the Supreme Court of Judicature Act, 1873, which provides:

> "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or have become of the essence of such contracts in a court of equity, shall receive in all courts the same con- H struction and effect as they would have heretofore received in equity."

They argued that under this section it is only necessary to consider whether, at the date of the institution of the action, time would in equity have been considered of the essence and that the subsequent act of the vendor, whereby he put it out of his power specifically to perform the contract, was immaterial. I cannot give to I the section in question the interpretation for which the respondents contend. It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on the breach thereof, the courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law, the Court of Chancery took cognisance of everything which had happened up to the date of the decree, and in applying s. 25 (7) of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The

section cannot in my opinion mean that the rules as to time laid down by courts of equity in certain cases, for certain purposes, and under certain circumstances only, shall be applied generally and without inquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Supreme Court of Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity.

The above considerations appear to me to be sufficient to dispose of this appeal, but JOYCE, J., decided the case on somewhat different grounds. He came to the conclusion that, irrespective of the resale of the property, equity would not, after the expiration of the notice of Jan. 30., 1912, have decreed specific performance or retained the action at law because of the vendor's delay, and that, therefore, notwithstanding s. 25 (7) of the Supreme Court of Judicature Act, 1873, there was no defence to the action. I agree with every word of JOYCE, J.'s judgment, both in his findings of fact and his statement of the law applicable to the case. As to the law, however, I desire to add a few remarks. Even in cases when the time fixed for completion is not in equity of the essence of the contract, the vendor's conduct may disentitle him to equitable relief, and in order to ascertain whether he is so disentitled, his conduct both before and after the day fixed for completion must be considered. The purchaser's conduct is also relevant, for a delay by the vendor without remonstrance from the purchaser is far from having the same effect as a similar delay in spite of such remonstrance. Thus in *Lloyd* v. *Collett* (7) between Aug. 10, 1792, the date of the contract, and Mar. 24, 1793, the date fixed for completion, the vendor had taken no step to make out his title, though the purchaser had previously applied for the abstract. Shortly after Mar. 25, 1793, the purchaser applied for a return of his deposit with interest, and repeated such application many times before June 10, 1793, when he commenced an action to recover it. It was held that though time would not otherwise have been held of the essence of the contract, the vendor was entitled to specific performance, and, therefore, could not restrain the action at law. Again, although the vendor's conduct may not, under the circumstances, be alone sufficient to disentitle him to specific performance, yet if he has been guilty of unnecessary delay, and the purchaser has served him with a notice limiting a time at the expiration of which he will treat the contract as at an end, equity will not, after the expiration of such time, provided it is a reasonable time, enforce specific performance or restrain an action at law. The time limited by such a notice is sometimes referred to as having become, by virtue of the notice, of the essence of the contract. In considering whether the time so limited is a reasonable time the court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts: *MacBryde* v. *Weekes* (8). Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do. It would be unjust and inequitable to allow the vendor to put forward his own unnecessary delay in the face of the purchaser's frequent requests for expedition as a ground for allowing him further time or as rendering the time limited by such a notice as that to which I have referred an unreasonable time.

In the present case I am of opinion that the time limited by the purchaser's notice of Jan. 30, 1912, was, under the circumstances, a reasonable time. The purchaser had continually pressed for completion. He had previously served

A similar notices which he had waived. It was of the utmost importance to him to complete the purchase as early as possible in order that he might, under the power reserved in the tenancy agreements, enter and cultivate the arable lands comprised in the purchase. And, in spite of all this, though nothing but the approval, engrossment, and execution of the draft conveyance remained to be done, the vendor had for some six weeks delayed to take proper measures to obtain such approval. B A great point was made as to the impossibility at the date of the notice of obtaining such approval and getting the approved draft engrossed and executed within the time limited by the notice. JOYCE, J., who has had great experience in conveyancing matters, held that all this could have been done within the time limited, and I respectfully agree with him. When the vendor resold the property to a third party there seems to have been no difficulty in completing the contract within C six days, one of which was a Sunday.

I must now refer to the decision of the Court of Appeal, which turned on the facts rather than the law. [HIS LORDSHIP reviewed the evidence.] With the greatest respect I cannot accept the view of the facts taken by the Court of Appeal. Even were I able to do so, I doubt whether the order dismissing the action could have been upheld, specific performance being out of the question. I know of no D precedent for restraining an action at law in aid of a forfeiture clause, and I cannot think that s. 25 (7) of the Supreme Court of Judicature Act, 1873, can have been intended to apply equitable principles for any such purpose. The judgment of JOYCE, J., should, in my opinion, be restored, with costs here and below.

E **LORD PARMOOR.**—If a contract for the sale of land is such that specific performance may be decreed in spite of failure to complete at the date named in the contract, time is said not to be of the essence of the contract. It was admitted that the present contract came within this category. The appellant did not claim that the respondents on Oct. 11 had committed default which would have entitled him to claim on that date repayment of the deposit. The question is whether the F respondents committed default in the performance of their contract at a later date by failure to comply with the notice of Jan. 30, 1912, and thereby became liable to repay the deposit. The answer to this question depends on whether the respondents had been guilty of delay when the notice was given, and whether the time fixed in the notice for completion was in itself reasonable. JOYCE, J., accepted a passage from SUGDEN ON VENDORS AND PURCHASERS (14th Edn.), p. 268, G as correctly expressing the general law:

> "Where time is not made of the essence of a contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay a distinct written notice by the other that he shall consider the contract at an end if it be H not completed within a reasonable time to be named would be treated in equity as binding on the party to whom it is given; but a reasonable time must be allowed."

The difficulty is not in the statement of the general law, but in its application by the courts to the facts of any particular case. In the present case it was not I known to the appellant at the date of the contract that the respondents had no more than a contract to purchase, and that the documents required to complete the respondents' title as between themselves and the tenant for life, from whom they were purchasing, had not been prepared. If, therefore, the delay of which complaint is made was due, not to the various steps required to complete the purchase of the appellant, but in connection with the purchase by the respondents from their vendors, I should come to the conclusion that such delay was unnecessary and due to a cause outside the contract made with the appellant. I think the correspondence shows that the arrangements to be made between the respon-

dents and the tenant for life from whom they were purchasing did cause the delay, and that but for this factor the purchase could easily have been completed by Jan. 30, 1912. This position is hardly disputed, and the case made was that the appellant subsequently to his contract did become aware of these special circumstances, and that the subsequent steps to complete the purchase were carried out on the understanding that the additional time thereby made necessary would be allowed. On the other hand, it was known to the respondents that it was of great importance to the appellant to complete the purchase on or before Jan. 1, 1912, in order that the appellant might be in a position to enter upon the farm, and to plough, sow, cultivate, manure, and manage all the arable land, as he would be entitled to do as of right under the terms of the existing tenancy when the purchase was completed. The parties must have contemplated that the purchase would be completed not later than Jan. 1, 1912. In the absence of explanation, I think that any delay beyond this date was unreasonable, and that the appellant would be justified in giving the notice of Jan. 30, 1912. What is the explanation given by the respondents? It is that the appellant, after he became aware that his vendor had no complete title, acquiesced that the time for completion should be extended to meet the consequent delay, and to enable the completion of a number of other sub-purchases from the vendor to be carried out at the same time. Counsel for the respondents has said it was not necessary that there should be a contract to this effect or an estoppel, but that it was sufficient to prove an understanding, and that if such an understanding was proved there was no ground to charge delay against the respondents. Whether there was such an understanding must depend on the evidence, but I can find therein no such understanding and certainly neither contract nor estoppel. [His Lordship discussed the evidence and correspondence, and continued:] On the question whether a sufficient time was allowed after the notice of Jan. 30, 1912, for the signing of the documents and for technical details, I am prepared to accept the great authority of Joyce, J., and to agree with his finding that the notice in the circumstances was not unreasonable. In my opinion, the appellant succeeds, and the appeal should be allowed with costs in this House and the Court of Appeal.

Order accordingly.

Solicitors: *Steavenson & Couldwell*, for *Stickney & Barton*, Hull; *Walter Maskell & Nisbet*, for *Cranfield & Wheeler*, St. Ives, Hunts.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

A

CHARING CROSS, WEST END, AND CITY ELECTRICITY SUPPLY CO., LTD. *v.* LONDON HYDRAULIC POWER CO.

[Court of Appeal (Lord Sumner, Kennedy, L.J., and Bray, J.), April 2, 3, 1914]

B [Reported [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 30 T.L.R. 441; 58 Sol. Jo. 577; 12 L.G.R. 807]

Nuisance—Rylands *v.* Fletcher *doctrine—Application—Pipes passed through soil by public authorities—Apparatus of one authority damaged by potentially dangerous property of other authority becoming actively mischievous.*

The rule in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, that, if a person C brings on land some dangerous thing which would not naturally come on it and may become mischievous if not kept under proper control, he will be liable for any mischief thereby occasioned, although he has not been guilty of negligence, is not limited to the case of adjacent freeholders, but extends to a case where persons are authorised to pass pipes or other apparatus through the soil and the property of the one is damaged by the potentially dangerous D property of the other becoming actively mischievous.

Where, therefore, the plaintiffs, an electric lighting company, acting under statutory powers, had placed under the surface of certain streets electric cables for the supply of electricity, and the defendants, acting under private Acts which contained a provision that they should not be exempt from liability for any nuisance caused by them, had placed under the same streets mains con- E taining water at a high pressure for the supply of hydraulic power, and the defendants' water mains burst owing to the subsidence of the soil and without any negligence on the part of the defendants, and damaged the plaintiffs' cables,

Held: as the defendants had brought into the road a dangerous thing which had escaped and damaged the plaintiffs' cables, they were liable for the damage, even though they had not been guilty of any negligence.

F *Midwood* v. *Manchester Corpn.* (2), [1905] 2 K.B. 597 and *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, applied.

Decision of Scrutton, J., [1913] 3 K.B. 442, affirmed.

Notes. Distinguished: *Goodbody* v. *Poplar Borough Council* (1914), 84 L.J.K.B. 1230. Considered: *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923. Followed: G *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145. Referred: *A.-G.* v. *Cory*, *Kennard* v. *Cory* (1919), 88 L.J.Ch. 410; *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] All E.R.Rep. 48; *Postmaster-General* v. *Liverpool Corpn.* (1922), 92 L.J.K.B. 382; *West Midlands Joint Electricity Authority* v. *Pitt*, *Minister of Transport* v. *Pitt* (1932), 96 J.P. 159; *Markland* v. *Manchester Corpn.*, [1934] 1 K.B. 566; *Read* v. *Lyons & Co.*, [1946] 2 All E.R. 471; *Beckett* v. *Newalls Insulation Co.*, [1953] 1 All E.R. 250.

H As to the dangerous user of property, see 28 Halsbury's Laws (3rd Edn.) 145–149; and for cases see 36 Digest (Repl.) 282 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; I affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *3634.*

(2) *Midwood* v. *Manchester Corpn.*, [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 54 W.R. 37; 21 T.L.R. 667; 3 L.G.R. 1136, C.A.; 38 Digest (Repl.) 43, *219.*

(3) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, *240.*

(4) *May* v. *Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, *216.*

(5) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L.T. 547; 10 T.L.R. 259, C.A.; 38 Digest (Repl.) 13, *52*.

(6) *Nichols* v. *Marsland* (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421*.

Also referred to in argument:

Ellis v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, *158*.

Appeal by defendants from a decision of SCRUTTON, J., reported [1913] 3 K.B. 442, in an action in which the plaintiffs claimed a sum of £717 4s. 1d. for damage caused to their electric mains and other property connected therewith by the escape of water from the defendants' mains.

In their statement of claim the plaintiffs said that they were an electric lighting company supplying electricity in various parts of London under the powers of various Acts of Parliament and Provisional Orders, and were entitled and authorised for the purposes of their business to construct, maintain, and use mains carrying electric cables beneath certain roadways and streets in the city of London, including Water Lane, Great Tower Street, Upper Thames Street, Cannon Street, and Swithin's Lane. The defendants were a company supplying water pressure for the purposes (inter alia) of working lifts in public buildings and private houses, and for the purposes of their business they had constructed, maintained, and used beneath the roadways above-mentioned and in close proximity to the plaintiffs' mains certain mains charged with water at high pressure. Mains of the defendants burst, one on Feb. 4, 1912, situate in Water Lane, one on Feb. 5, situate in Upper Thames Street, one on Feb. 13, situate in Cannon Street, and one on Aug. 27, 1912, situate in St. Swithin's Lane. On each of those occasions the water from the defendants' mains escaped therefrom, causing damage to the plaintiffs' mains, electric cables, and other property, and necessitating the execution of extensive repairs, amounting in all to £717 4s. 1d. The plaintiffs pleaded that the damage sustained by them was the natural consequences of the acts of the defendants in bringing water at high pressure into their mains (which was likely to cause injury in the event of its escaping) and allowing such water to escape therefrom at the places mentioned. Alternatively, they said that, as the mains were the property of and under the control and management of the defendants, and the bursting of such mains was an occurrence which in the ordinary course should not and would not happen if all proper precautions were taken, such burstings were in themselves evidence that the same arose from lack of care on the part of the defendants. In the further alternative, they said that the damage was due to a nuisance caused by the defendants in the carrying on of their business. The plaintiffs claimed £717 4s. 1d. in respect of the damage. By their defence the defendants said that they were a statutory body incorporated and carrying on business under the London Hydraulic Power Co.'s Acts, 1871 to 1903. They said that, if any of their mains burst so that water escaped and damage occurred, in no instance was it the result of any negligence, nuisance, or default on the part of the defendants, but the same occurred in consequence of subsidences or disturbances not caused or made by the defendants in or of the soil of the streets or roadways over which the defendants had no control. Alternatively the defendants said that the alleged burstings and escapes of water in Water Lane, St. Swithin's Lane, and Upper Thames Street (if they occurred) were caused or contributed to by the plaintiffs' own works, which disturbed and impaired the permanent support and safety of the defendants' hydraulic mains in those streets. SCRUTTON, J., held that the defendants were not entitled to rely on the defence that they had laid their mains under statutory authority; that the doctrine of *Rylands* v. *Fletcher* (1) applied as between co-users of the streets as well as to owners of adjoining property; and that, as the defendants had brought into the road a dangerous thing which had escaped and damaged the plaintiffs' cables, the defendants were liable for the

damage, even though they had not been guilty of any negligence. The defendants appealed.

Sankey, *K.C.*, and *F. Gover* for the defendants.
McCall, *K.C.*, and *C. B. Marriott* for the plaintiffs.

LORD SUMNER.—This is an appeal from a decision of SCRUTTON, J., in favour of the plaintiffs' claim in respect of damage to their underground electric cables occasioned by the escape of water from the defendants' underground mains. Both plaintiffs and defendants are companies carrying on undertakings for profit, for the purpose of which they have obtained statutory permission and powers under private Acts of Parliament. The damage complained of was sustained by the cables in four different places in which the mains of the defendants and the cables of the plaintiffs were underneath the surface of the street. They are all cases in which, in substance, the sequence of events leading to the injury was the same. As found by SCRUTTON, J., it is substantially that, the mains having remained in safety underground for a considerable time, in 1912 there were subsidences of the soil through which the mains passed, so that the mains were left unsupported in places, whereupon the weight and pressure of the pipes, and the water within, probably assisted by the vibration of the heavy traffic, caused the mains to burst on four occasions. The effective cause was the subsidence. This was due to the nature of the soil, and the traffic over it. For the purposes of their undertaking the defendants charged their mains with water at very high pressure, because, by the Acts of Parliament which they have obtained, they are incorporated for the purpose of supplying power by hydraulic pressure for cranes and similar uses and are not allowed to supply water for any purposes which would come into competition with the ordinary water supply. Accordingly, they have to keep their mains charged at very high pressure, and as soon as the breaks occurred the water escaped under a very high head. How soon it reached the neighbouring cables, I do not know, but no doubt there would be a complete wash out of the earth, injury to the cables, and a penetration of the insulation by the water under pressure comparatively soon, and with serious results. Negligence was alleged, and was negatived by the learned judge.

The first question is whether, under those circumstances, the plaintiffs sustained particular injury by what was a nuisance, or an invasion of their rights in the nature of a nuisance, by the defendants, and, without wishing to treat the arguments with any disrespect, I think I can answer that briefly, if curtly, by quoting COLLINS, M.R., in *Midwood* v. *Manchester Corpn.* (2) ([1905] 2 K.B. at p. 605): "If that was not a nuisance, I do not know what would be one." At that point I think it might be enough to dispose of this case by saying that as *Midwood* v. *Manchester Corpn.* (2) is an authority binding upon this court, being a decision of this court, unless it can be effectively distinguished nothing more need be said. The facts of that case were that the plaintiffs had premises and stock-in-trade adjoining a street in Manchester. The defendants, the Manchester Corporation, who were the undertakers of the electricity supply, had their mains in the streets. Negligence was not relied upon. Somehow or other the insulation of the conductors failed, a short circuit of the electricity took place, the heat so generated volatilised the bitumen in which the main was laid, and that gave off an inflammable gas which accumulated and presently found its way into the house adjoining the plaintiff's premises in the street in which the main was laid, where it ultimately exploded, causing the fire by which the plaintiff's property was damaged. The point is that there the defendants, the corporation, had this main in the street, and the gas generated from its apparatus spread into the premises adjoining the street. As I say, it might be sufficient to say that *Midwood's Case* (2) is indistinguishable, but lest there should be any misunderstanding I think that the present case is also indistinguishable from *Rylands* v. *Fletcher* (1), a decision of the House of Lords.

However, two grounds of distinction have been suggested, upon which both these cases may be laid aside. It is said that the doctrine of *Rylands* v. *Fletcher* (1) is applicable between the owners of adjacent closes, "adjacent" not being relied upon as meaning "adjacent" in the sense of there being no intermediate property, and that it depends upon the ownership of land and the rights attaching to the ownership of land—a doctrine under which any violation of that right can be prevented or punished. Then it is said that in the present case, instead of having two adjacent owners of property, you have two neighbouring owners, not strictly adjacent, of chattels, whose chattels are there under a permission which might have been obtained by the private licence of the owners of the soil, but in fact came under Parliamentary powers. It is also said that the two companies are in the position of co-users of a highway, or at any rate of co-users of different rooms in one house, and that, therefore, the doctrine of *Rylands* v. *Fletcher* (1) does not apply, but that other doctrines applicable to the highways, or to houses let out in tenements, do apply.

I am unable to agree with any of these distinctions, though they have been pressed upon us by learned counsel with great resource and command of the authorities. *Midwood's Case* (2) is not a case of a dispute arising between the owners of two adjacent closes. I do not know anything about the ownership of the soil in that street, but the case is treated as one between a corporation, whose business by its electric mains under the roadway is exactly similar to that of the defendant corporation here, and of injury done to persons who were the occupiers —I do not know whether they were the owners or not—of the adjacent premises. If the distinction which is rested upon the difference between the present case and that of the two adjacent landowners in *Rylands* v. *Fletcher* (1) be a good one, it is one which either was not taken in *Midwood's Case* (2), or was taken and treated as of no importance, because certainly it was one that might have been taken upon the facts there. Therefore I think on the authority of *Midwood's Case* (2) alone we are precluded from relying upon that distinction. But I do not limit myself to that, because I am quite satisfied that, as far as *Rylands* v. *Fletcher* (1) is concerned, that doctrine is not limited to the case of adjacent freeholders. I shall not in the least attempt to show how far it extends. I think it extends as far as this case, and that is enough for the present purpose. It is quite true that in *Rylands* v. *Fletcher* (1) there were adjacent freeholders, one of whom had made a reservoir on his land, and the other had excavated old mining workings on his land. That is why you find in the judgments both of the Exchequer Chamber and in the House of Lords precise statements, because they are limited to the facts of the case in which attention is drawn to the use of the close and the natural user of the land, the rule of law being that one who for his own purposes brings on his land and keeps there anything likely to do mischievous damage if it escapes must keep it at his peril. But it is quite clear from the illustrations and the reasoning in both courts that they had no intention of confining the principle to the case of adjacent freeholders. It is enough if I refer to the report of *Fletcher* v. *Rylands* (1) in the Exchequer Chamber, in which BLACKBURN, J., delivered the judgment of the court, and spread wide his net to so early a date as to find all manner of illustrations. He begins as early as Edward IV, where the Chief Justice lays down the doctrine in the case of trespass with cattle, to which the defence was that the plaintiff's land adjoining the place where the defendant had common, the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. He then goes on to the next case—*Cox* v. *Burbidge* (3)—a well-known case about a horse straying on the highway and kicking a child, and then *May* v. *Burdett* (4), and he illustrates the doctrine by these cases where the obligation rests upon the defendant owner of the animal, and the liability of the owner of the animal for any trespass it may commit. Again, to show that it is not in the least a casual matter I find that in the judgment of LORD CRANWORTH in *Rylands* v. *Fletcher* (1) the same considerations are

A referred to, and he speaks of the principle, not as confined to the cases of landlords, but in very broad terms in these words (L.R. 3 H.L. at p. 341):

> "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

B That is not a precise proposition of law, but it is inconsistent with there being any idea in his Lordship's mind that *Rylands* v. *Fletcher* (1) was confined to the invasion of a right of property in soil.

So far, then, it appears to me that this case is governed by *Rylands* v. *Fletcher* (1). But then it is said that that is not so because *Rylands* v. *Fletcher* (1) is a case C of adjacent owners, or be it occupiers, or be it even of licensees, of separate loci. I forbear to say "closes," or to specify what the premises might be. This case, it is urged upon us, depends on part of the law of highways; it is a case of joint and successive user by two parties of one highway which is common to them both. I think the same idea is involved in the other class of cases cited, that of joint occupiers of one house. Upon this part of his judgment, and upon this only, I D differ from SCRUTTON, J., because he clearly ([1913] 3 K.B. at pp. 449, 450) was disposed to sanction that this was a case of the joint user of highways. It so happens that these cables and mains were laid under the highway for the very reason that to have required that they should be laid under private premises would either have involved the purchase of the freehold, or have made accessibility to the cables and the mains, for the purpose of keeping them in order and repairing E them, almost impossible. Therefore, following the usual practice, they are laid under the highway, but the laying of them and the using of them is no part of the use of the highway. How thick a highway is I do not know. I suppose practically it has a certain thickness. However thick or thin the surface of a highway may be, I should think it was quite clear that where you found cables and mains laid you might be perfectly certain that there the highway ceased, and, if they are F laid at that depth, whatever it may be, deep or shallow, they are not in the highway, but underneath it. It seems to me, therefore, that this is a pure and simple case of licences for two independent persons to pass their apparatus through the soil—the ownership of which is not material here—with certain additional rights or permissions of breaking up the superincumbent surface of the highway, but the enjoyment of these licences is no co-joint user of the highway at all. If that is so, G I think that analogy of the various cases, both on nuisance and on co-occupation of a house, which was referred to, fails. It was said by the defendants: We got there first. The plaintiffs came with their cables afterwards; they must, therefore, take the place as they find it, and one of the ways in which that place may be dangerous is the presence of our mains, and, unless there is negligence, they cannot recover. Of course there are cases where a person is held not to be entitled H to complain of a nuisance which has arisen from the accustomed way of dealing with the property and where that person has gone to the nuisance instead of the nuisance coming to him. No doubt similar cases can be put in connection with licensees who go upon premises that are in a more or less hazardous condition, but I do not see that the analogy is made out. If it had been part of the normal condition of these mains that they squirted out water under very high pressure I from time to time, I could have understood that there was some substance in the argument, but taking the case as you find it on the argument, and assuming that the mains were sound and in good condition and contained the water instead of releasing it, as they have done for years and years without complaint, I think that the argument founded upon the sequence of dates is entirely illusory.

There is then another argument which is based upon the language of the defendants' Acts of Parliament themselves. I will make a short allusion to these two Acts for this purpose. The Act of 1871 incorporated the defendants and recited that they proposed to carry on an undertaking that was beneficial to the

public. Without some such recital being proved I suppose no private Act could be passed. They are not incorporated as waterworks supply companies are incorporated, with an obligation to supply water to the public; they are given powers of taking water on terms and of laying mains on terms, but they are not laid under a public Parliamentary obligation to keep their mains charged with water at this very high pressure, or, I think, at all, and that serves at once to distinguish the class of cases of which *Green* v. *Chelsea Waterworks Co.* (5) was an illustration, where the principle is that, if the legislature has required the owner of the undertaking to do that which has caused the damage, his liability for that damage must rest upon his negligence in his way of doing it, and not upon the doing of it itself. In the first Act of 1871, which incorporated the company with its capital, and gave it power to take water from the Thames on condition that it returned it to the Thames, and restrained it from using water except for the purposes of its undertaking and so on, there was no clause in pari materia with s. 17 of the later Act which extended the area of the undertaking and made further provisions of a permissive character for the operations of the company, but did not impose obligations upon them. Section 17 of this later Act is:

> "Nothing in this Act shall exempt the company from any indictment, suit, action or other proceeding at law or in equity in respect of any nuisance caused by them."

It is said that, in so far as that section applies, the plaintiffs have to prove that, if this was a nuisance, the nuisance was caused by the defendants. It is suggested that the nuisance was caused, not by the defendants, but by an act of God or some other person—unknown passers-by on the surface of the highway. I do not at all agree that in this clause "nuisance caused by them" is to be read in any restricted sense which would save the defendants, even although there had been other jointly operating causes as well as their own acts which led to the breakdown. But, I think, when one reads the facts as found by the learned judge it is quite plain from them that this nuisance was caused by the defendants. It is not having water in the pipes that is the legal wrong; it is not even subjecting the water in the pipes to the very high pressure that is necessary for the defendants' undertaking that is a legal wrong; it is letting the water escape that is the legal wrong, as was stated in *Nichols* v. *Marsland* (6). There is no doubt about it. Therefore, the question is: What caused the nuisance that consisted in streams of water, under a very high head, suddenly issuing from a fracture in the pipe? The fracture in the pipe, according to the learned judge's finding, is only conduced to by the traffic and the vibrations caused by the traffic. The immediate cause of the fracture of the pipe was its own weight with the water inside it when suspended between two points instead of being continuously supported by the subjacent soil which had subsided. But the thing which actually caused the water to squirt out was the working of the defendants' engines; if it had so happened that, at the time of the fracture, the engines had not been working, or if it had been possible simultaneously with the fracture to cut off the pressure, although it may be that some damage would still have been done, I am quite certain that the damage would have been done in a very different way, and to a very different extent, and I should think, although the facts are not before us, that much of the damage would have been of a very different kind. Therefore, I think that on any possible reading of the words "nuisance caused by them" this escape of water constituting a nuisance was caused by the defendants.

Therefore, we are of opinion that the case is covered by authority which binds us—by authority, which is well settled, and as to which I should not have thought it was possible to raise any doubt, in the House of Lords, and indistinguishable from these authorities, either upon the facts of the accident or of the nature of the locus in quo, and that the statutory answer to the claim is an unfounded one. I think the appeal should be dismissed with costs.

KENNEDY, L.J.—I am of the same opinion, and I entirely agree with the reasoning which has been expressed in the judgment just delivered. I will only add that, in my view, this case would be sufficiently decided by saying that it is indistinguishable on any material point from *Midwood's Case* (2), and the judgment in *Midwood's Case* (2) places the right of the plaintiffs to succeed, so far as this court is concerned, beyond all doubt. It was attempted—as a suggestion merely—to say that in *Midwood's Case* (2), in addition to a cl. 70 in the statutory order there which corresponds with s. 17 of the later of the two Acts in the present case, there was another clause, namely, cl. 67, but, on looking through the judgment, it is quite clear that the fact that there was also a cl. 67 in that case had no effect materially governing the decision. It was cl. 70 of the order which was relied upon, and the only reference, I think, in all three judgments to the existence of cl. 67 is in the judgment of MATHEW, L.J., in which he says ([1905] 2 K.B. at p. 610), not that cl. 70 is to be read by the light of cl. 67, but that:

> "cl. 70 of the order seems to me to be decisive. I think the provisions of cl. 67 of the order in this case must be read by the light of cl. 70."

Clause 70, as I have said, is substantially identical, as it seems to me, with s. 17 of the 1884 Act in the present case, and, as my Lord has said, that Act, by its terms, governs the case, although some portion of the defendants' mains were brought into being under earlier legislation, which, by the Act of 1884, is incorporated with the Act of 1884. Therefore, in my view, according to the true construction, s. 17 of the later Act applies to all the mains in question. It has been said in the course of argument, the substance of which has been dealt with by my Lord, that the plaintiffs in the present case came upon the ground, if I may use that expression, after the defendants' mains had been placed there, and were, therefore, so to speak, obliged to take the position for their works subject to risks which might arise from the earlier works. I think that argument for the defence is fallacious. The plaintiffs did, in fact, go there at later dates, but I think the earliest of the works that they put in was somewhere about 1901. They went there, if you look at it according to the true light to be got from the facts, with the knowledge that they were persons whose works would be protected from injury by the existing works. They went there, in fact, after the Act of 1884 had come into force, and, therefore, apart from any implication from the general law which would give them protection from nuisance, they went there with the knowledge that, whatever there was there, was there under the condition of paying compensation for damage if nuisance arose. Did nuisance arise? In my opinion, it clearly did in this case. As I have said, I am not going to repeat the reasoning, which has already been expressed, and makes *Midwood's Case* (2) a case which governs us, but which, and I quite concur, also says that the principle applicable in *Midwood's Case* (2) and in the present case is the principle in *Rylands* v. *Fletcher* (1), which cannot be distinguished on any of the grounds that have been suggested by the argument for the defendants. I agree this judgment should be as my Lord has stated.

BRAY, J.—I am of the same opinion. Treating this case, first of all, without regard to the statutory authority which the defendants have, it seems to me quite clear that it comes within the principles of *Rylands* v. *Fletcher* (1). It was said that it was not within those principles because *Rylands* v. *Fletcher* (1) is the case of owners of adjoining closes of land, but, in my opinion, that is not so. The head note of *Rylands* v. *Fletcher* (1) (L.R. 3 H.L. at p. 330) is this, and I may say that I have looked through these speeches of the Lord Chancellor and the other learned Lords, and it is abundantly justified by what is said there:

> "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself

dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned."

"For any mischief thereby occasioned," that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but, any mischief thereby occasioned, and in the earlier part of the headnote reference is made to the owner bringing the dangerous thing on his land. It seems to me it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy the land for a certain purpose, as the defendants have, for these pipes, it is equally his for the purpose of testing this principle. Therefore, I think that *Rylands* v. *Fletcher* (1) applies, and, if it applies, the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is, in itself, dangerous and probably mischievous if not kept under proper control.

If the case is within *Rylands* v. *Fletcher* (1), the next point is to see whether the statutory power that is given the defendants gives them any protection. Undoubtedly the cases show that, if statutory power is given without any limitation that does protect them except it be shown that they have acted negligently. Then comes s. 17, which has been read and which I will not read again. What is the effect of that section? In my opinion, the effect of it is, paraphrasing the language somewhat: You may put your pipes on this land, but you are not to be entitled by reason thereof to any protection against claims by other persons who have sustained injuries arising from any actionable nuisance which you may commit, and, therefore, if it be shown that the plaintiffs have sustained an injury by an actionable nuisance committed by the defendants, then they have no protection. The next point which is taken is that the defendants have not committed any nuisance. In my opinion, the findings of the learned judge show that the injuries were caused by them. Lord Sumner has explained this and I need not refer to it further.

The next point is that s. 17 does not apply to injuries caused by water in pipes which were laid before the passing of the Act of 1884. The Act of 1884 is to be read with the preceding Act, and it imposes, in my opinion, a limitation upon the exercise of their powers. They were exercising their powers at the time they caused this nuisance, which was after the passing of the Act of 1884, and, therefore, it seems to me that s. 17 imposed that limitation on the exercise of the defendants' powers. The last point taken was this: "We got there first." In order to make that good, it seems to me that it must be shown that, by virtue of the powers given to the defendants, they were given some right to interfere with the beneficial use of the land by the adjoining owner. In my opinion, they were given no such right at all. If this Act did not deprive the owner of the surrounding land from any beneficial use of his land, and if he might use his land in this way, he would be entitled to exactly the same remedies as he could otherwise have got, so that there is no protection, in my opinion, to be given because of the defendants coming there first. It does not matter to whom the surrounding land belongs.

When the legislature gave to them these powers, they did not take away from the right of the owner of that surrounding land any of the rights which he otherwise had, and, therefore, in my opinion, the judgment must be affirmed.

Appeal dismissed.

Solicitors: *Fladgate & Co.*; *Beale & Co.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

CRANE *v.* SOUTH SUBURBAN GAS CO.

[KING'S BENCH DIVISION (Avory and Lush, JJ.), November 1, 1915]

[Reported [1916] 1 K.B. 33; 85 L.J.K.B. 172; 114 L.T. 71; 80 J.P. 51; 32 T.L.R. 74; 60 Sol. Jo. 222; 14 L.G.R. 382]

Highway—Negligence—Nuisance—Dangerous work on or adjacent to highway—Absence of reasonable precautions—Intervention of third party—Injury to user of highway—Liability of original wrongdoer.

Where a person does something on or adjacent to a highway which is dangerous to persons lawfully using the highway he is guilty of a nuisance unless proper steps are taken to guard such persons from danger, and if, through the intervention of a third party such a person is injured the person who originally caused the nuisance is guilty of negligence if he ought reasonably to have anticipated the intervention and foreseen what the result would be.

The defendants, in the exercise of their statutory authority, were repairing a gas main in a highway, work necessitating the use of molten lead which was placed on a fire pail standing on a piece of vacant land adjoining the highway where children were playing. The pail was left unguarded and a boy accidentally knocked against it and upset the lead, thereby injuring the plaintiff. The county court judge held that the defendants were negligent in leaving the lead unattended knowing it was surrounded by young children and gave judgment for the plaintiff.

Held: (i) the county court judge was entitled to find that the defendants were guilty of negligence, and their negligence was the effective cause of the injury to the plaintiff, as the action of the boy who accidentally knocked over the pail should have been reasonably foreseen; (ii) the act of the defendants constituted a nuisance as they were doing something on or adjacent to a highway which was dangerous to persons lawfully using the highway without taking proper precautions to guard such persons from the danger.

Notes. Referred to: *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 737.

As to the standard of care in negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 10 et seq.; and for cases see 36 DIGEST (Repl.) 22 et seq. As to nuisances on the highway, see 19 HALSBURY'S LAWS (3rd Edn.) 270 et seq.; and for cases see 26 DIGEST (Repl.) 466 et seq. As to the proximate cause in tort see 11 HALSBURY'S LAWS (3rd Edn.) 277 et seq.; and for cases see 17 DIGEST (Repl.) 115–117.

Cases referred to:

(1) *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(2) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(3) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(4) *Barnes* v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100*.

(5) *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731; 29 L.J.C.P. 203; 1 L.T. 440; 6 Jur.N.S. 897; 8 W.R. 277; 141 E.R. 1003; 36 Digest (Repl.) 65, *356*.

Also referred to in argument:

Jenkins v. *Great Western Rail. Co.*, [1912] 1 K.B. 525; 81 L.J.K.B. 378; 105 L.T. 882, C.A.; 36 Digest (Repl.) 64, *346*.

M'Lelland v. *Johnstone* (1902), 4 F. (Ct. of Sess.) 459; 39 Sc.L.R. 326; 9 S.L.T. 379; 36 Digest (Repl.) 124, **919*.

Appeal from Dartford County Court.

In the circumstances stated in the headnote the county court judge gave judgment for the plaintiffs for £25 and costs. The defendants appealed upon the following grounds: (i) there was no evidence of negligence on the part of the defendant company or its servants on which the learned judge could give judgment for the infant plaintiff; (ii) there was no evidence of any negligence on the part of the defendant company or any of its servants which caused the injuries to the infant plaintiff; (iii) the defendant company were not responsible for the act of the boy who upset the fire pail and lead ladle and so caused the injury to the infant plaintiff; (iv) the learned judge's judgment was wrong in law.

Morton Smith for the defendants.
J. D. Cassels for the plaintiff.

AVORY, J.—In this case the defendants in the execution of their duty, certainly in the execution of their right, were repairing a gas pipe in the highway and for that purpose they had made an excavation in the highway, and I will assume for the purpose of my judgment that it was necessary for the execution of the repairs to have a fire upon or close to the highway, and that it was necessary that they should have molten lead upon or close to the highway. The fire and the molten lead were in fact at a spot close to the paved portion of the highway and clearly at a spot to which the public had a right of access. Whether the spot was part of the highway or not is immaterial; if not part of, it was adjacent to the highway and a place to which the public had the right of access. A boy passing along and lawfully using the highway and passing this spot accidentally knocked against the pail in which the fire was, and the molten lead was thereby spilt upon the infant plaintiff, who was standing close to the fire. Under these circumstances this action was brought and the learned county court judge gave judgment for the plaintiff finding, as he said in his note, that "the defendants were guilty of negligence in leaving a fire of this character unattended and unguarded with the knowledge that it was surrounded by young children and that it was being used for molten lead."

The only question that this court has to determine is whether or not there was any evidence upon which the learned county court judge could come to that conclusion. Our attention has been called to the fact that the claim was originally framed in two ways. First on the ground that the defendants were negligent in leaving the fire and the molten lead unattended and unfenced, and alternatively that they were committing a nuisance. In my opinion, there was evidence upon both these alternative heads of claim upon which the learned county court judge could properly find a verdict for the plaintiff. Had I tried the case myself I should have preferred to base my decision upon the second point—namely, that the acts of the defendants constituted a nuisance, in this sense, that they were doing something on or adjacent to a highway which was dangerous to persons lawfully using the highway unless proper steps were taken to guard such persons from danger. It is clear from the authorities that a person doing such a thing on or adjacent to a highway, even though it is something which he might lawfully do if he took proper precautions to guard the public from injury, is in fact committing a nuisance if he does that thing without taking these precautions. *Latham* v. *R. Johnson and Nephew, Ltd.* (1) which counsel for the defendants relied upon as showing that *Cooke* v. *Midland Great Western Railway of Ireland* (2) is not binding upon us, does not, in my opinion, help the defendants' argument, because in the course of their judgments in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) the lord justices took care to point out that the case they were dealing with was that of a licensee upon land that was not part of a highway or adjoining a highway. FARWELL, L.J., after referring to the authorities which lay down the law as to mere licensees, points out ([1913] 1 K.B. at pp. 405, 406) that there are four exceptions to the freedom from liability of the owner of the land—namely, "allurement,"

A "concealed trap," "invitation," and "the introduction into the land to which the licence applies of something out of the normal user of the land, known to the owners to be dangerous, without warning the licensee"; and he continues (ibid. p. 407):

> "If the law be as I have stated and believe it to be, there is nothing in this case to raise any liability in the defendants. There is neither allurement nor trap, invitation, or dangerous animal or thing."

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The learned lord justice then points out that no new principle was established by *Cooke* v. *Midland Great Western Railway of Ireland* (2), and adds (ibid. at p. 408), that the real mischief in that case was:

> "a machine 'attractive to children and dangerous as a plaything,' to use LORD MACNAGHTEN'S words ([1909] A.C. at p. 236), and there is cast on persons who put in a place, open to their licensees a thing dangerous in itself, a duty to take precautions for the protection of others who will certainly come into its proximity";

C

and HAMILTON, L.J., says ([1913] 1 K.B. at p. 412):

> "It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway. Such cases, so far as they relate to children, may in that particular be to some extent in point, but the differences between cases of nuisance and cases of negligence must never be lost sight of."

D

It is only necessary to consider one further point, which I think does not help the defendants, but rather the contrary. The authorities, like *Lynch* v. *Nurdin* (3), which were cited to us are cases in which the proximate cause of the injury was a child, other than the plaintiff, playing or interfering with the thing which caused the injury. The present case is not a case of a child wilfully interfering or playing with the thing which caused the injury. Upon the facts we must take it that the injury was caused by a passenger accidentally knocking against the dangerous thing, which was standing on the highway. In these circumstances, I cannot doubt that it, therefore, comes within the principle that the person who originally caused the nuisance is guilty of negligence, and will still be the effective cause of the injury, if he ought reasonably to have anticipated such intervention and to have foreseen what the result would be. Under these circumstances, I think that the learned county court judge was entitled to find that the defendants were guilty of negligence. The appeal must, therefore, be dismissed.

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LUSH, J.—Counsel for the defendants raised three contentions: (i) That the only obligation on the defendants, so far as the plaintiff was concerned, was not to create a hidden trap, and he says that no such trap was created by the defendants or their servants. (ii) That if there was a duty imposed upon the defendants to take reasonable care beyond this, there was no evidence of any breach of such duty; and (iii) that, even if there was such a duty and a breach thereof, the proximate or effective cause of the accident was the intervention of a third party, and that there was no connection between the breach of duty and the accident.

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As to the first contention, it seems to me that the question whether or not there was a trap has nothing to do with a wrongful act done upon a highway or upon land adjacent to a highway. That question only arises where the person who is alleged to have created the trap has given a licensee permission to use the premises upon which the nuisance exists. This case is not of that kind. When you are dealing with a highway or land adjacent to a highway you get out of the region of hidden traps. The obligation is not to create a nuisance, and land adjacent to a highway is on exactly the same footing as a highway itself: *Barnes* v. *Ward* (4); *Hounsell* v. *Smyth* (5). What the defendants did here was to put a thing which was a danger on a highway or on land adjacent to a highway. My own opinion is that the place where this fire was must be considered to be the highway, but for

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the reasons which I have indicated it is immaterial whether it was the highway or land adjacent to it.

Had they authority to do this as they did? They certainly had no express authority to place a dangerous thing on the footpath. They had authority to do what was reasonably necessary to fulfil their duty with regard to the repair of the gas pipes; but if they could have done this without committing a nuisance, as they clearly could by fencing or guarding in some way, it is impossible to say that they could do it in a way which would cause a nuisance. They did it in a way which created a nuisance; they, therefore, not only owed a duty to the plaintiff, but there was evidence of a breach of that duty, because they did what might have been done in safety in such a way as to be a nuisance, and the plaintiff was injured owing to that breach of duty.

With regard to the third point, that the intervention of the boy was a reason for saying that the creation of this nuisance was not the effective cause of the injury, in my opinion, the county court judge was right in dealing with this matter also in the way he did. Undoubtedly the intervention of a third party may break the link which joins the wrong and the injury which follows from it. If a third party intervenes as the immediate cause of a wrong and the original alleged wrongdoer had no reason to anticipate such an intervention, clearly there would be a break and the injury could not be said to be the necessary consequence of the breach of duty on the part of the original wrongdoer. But the evidence in this case affords no support to the contention that there was such an intervention as would relieve the defendants of liability. Here the boy and the child were both lawfully using the highway, the boy accidentally tripped against the pail and upset it, and the accident resulted. The principle has been laid down by HAMILTON, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.* (1) ([1913] 1 K.B. at p. 413):

> "That a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself that injury would not have occurred."

That being the principle applicable, it is clear that the defendants were liable and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Blyth, Dutton, Hartley & Blyth; T. G. Baynes, Dartford.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

WILLIAMS BROS. *v.* Ed. T. AGIUS LTD.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Moulton and Lord Parker of Waddington), February 16, 27, 1914]

[Reported [1914] A.C. 510; 83 L.J.K.B. 715; 110 L.T. 865; 30 T.L.R. 351; 58 Sol. Jo. 377; 19 Com. Cas. 200]

Sale of Goods—Contract—Breach—Measure of damages—Difference between contract price and market price—Relevance of agreement by buyer to re-sell—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 51 (2).

By a contract dated June 25, 1910, the respondents sold to the appellants six cargoes of coal at a price of 16s. 3d. per ton, c.i.f., to be shipped to specified ports in Italy, shipment every alternate month beginning in January, 1911. By a contract dated Oct. 28, 1911, the appellants sold to one G. a cargo of the coal at the price of 19s. per ton, and they appropriated the November shipment to that contract. On or about Oct. 31 the respondents bought from G. the cargo sold to him by the appellants under the contract of Oct. 28, which G. purported to assign to them, and they then failed to deliver the November shipment to the appellants. At the date of this breach of the contract of June 25, 1910, the market price of coal of the class contracted to be sold under that contract was 23s. 6d. per ton. On a claim by the appellants for damages for the breach of contract,

Held: the transaction between the appellants and G. did not arise out of the consequences of the breach and so could not be taken into account in estimating the damages payable by the respondents to the appellants; the measure of damages for a breach of contract by the non-delivery of goods under a contract was the difference between the contract price and the market price at the date of the breach, unaffected by any contract to re-sell entered into by the buyer; and, therefore, the damages payable by the respondents to the appellants was the difference between 16s. 3d. and 23s. 6d. per ton, i.e., £1,631 5s., and not the difference between 16s. 3d. and 19s. per ton, i.e. £618 15s.

Rodocanachi v. *Milburn* (1) (1886), 18 Q.B.D. 67, approved and applied.

Notes. Considered: *Weir* v. *Dobell*, [1916] 1 K.B. 718. Applied: *Slater & Co.* v. *Hoyle and Smith*, Ltd., [1918–19] All E.R.Rep. 654. Considered: *James Finlay & Co., Ltd.* v. *N. V. Kwik Hoo Tong Mandel Maatschappij*, [1928] All E.R.Rep. 110; *The Arpard*, [1934] All E.R.Rep. 326; *Brading* v. *McNeill & Co.*, [1946] Ch. 145. Referred to: *Jamal* v. *Moolla Dawood*, [1916] 1 A.C. 175; *Lebeaupin* v. *Crispin & Co.*, [1920] All E.R.Rep. 353; *Montevideo Gas and Drydock Co.* v. *Clan Line Steamers* (1921), 37 T.L.R. 544; *Sheik Mohammad Habib Ullah* v. *Bird & Co.* (1921), 37 T.L.R. 405; *Taylor* v. *Bank of Athens*, *Pinnock* v. *Bank of Athens* (1922), 91 L.J.K.B. 776; *Foscolo Mango & Co.* v. *Stag Line, Ltd.*, [1931] 2 K.B. 48; *Biggin & Co.* v. *Permanite, Ltd.*, [1950] 2 All E.R. 859; *British Motor Trade Association* v. *Gilbert*, [1951] 2 All E.R. 641; *Mouat* v. *Betts Motors, Ltd.*, [1958] 3 All E.R. 402.

As to damages in an action for non-delivery of goods, see 34 Halsbury's Laws (3rd Edn.) 148–155, and for cases see 39 Digest 668–672. For Sale of Goods Act, 1893, see 22 Halsbury's Statutes (2nd Edn.) 985.

Cases referred to:

(1) *Rodocanachi* v. *Milburn* (1886), 18 Q.B.D. 67; 56 L.J.Q.B. 202; 56 L.T. 594; 35 W.R. 241; 3 T.L.R. 115; 6 Asp.M.L.C. 100, C.A.; 39 Digest 669, *2570*.

(2) *British Westinghouse Electric and Manufacturing Co., Ltd.* v. *Underground Electric Rail Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 56 Sol. Jo. 734, H.L.; 39 Digest 480, *1025*.

(3) *Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 16 Com. Cas. 297, P.C.; 39 Digest 672, *2588*. A

(4) *Great Western Rail. Co.* v. *Redmayne* (1866), L.R. 1 C.P. 329; 12 Jur.N.S. 692; 39 Digest 152, *958*.

Also referred to in argument:

Williams v. *Reynolds* (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L.J.Q.B. 221; 12 L.T. 729; 11 Jur.N.S. 973; 13 W.R. 940; 122 E.R. 1278; 39 Digest 675, *2608*. B

Charles v. *Altin* (1854), 15 C.B. 46.

Appeal from an order of the Court of Appeal (108 L.T. 906) (VAUGHAN WILLIAMS, L.J., and BRAY, J., HAMILTON, L.J., dissenting), reversing an order of BAILHACHE, J. (107 L.T. 707), upon an award of an umpire in the form of a Special Case. C

The facts appear in the headnote and their Lordships' opinions.

Roche, *K.C.*, and *Cuthbertson* for the appellants.

Leck, *K.C.*, and *Raeburn* for the respondents.

Their Lordships took time for consideration.

Feb. 27, 1914. The following opinions were read. D

VISCOUNT HALDANE, L.C.—The facts out of which this appeal arises may be stated shortly. The respondents sold to the appellants six cargoes of a certain coal to be shipped every two months in 1911. It is as to one of these cargoes, which was to be shipped in November, that the dispute arises. The price was to be 16s. 3d. per ton net, c.i.f., Genoa, or Savona, or Spezzia, or Leghorn, orders E to be given on signing bill of lading, or 17s., c.i.f., Venice, on certain terms. The point to be decided relates to the cargo in question, which the respondents failed to ship, and is: What damages are payable by the respondents to the appellants on the facts as stated by the umpire in his award in an arbitration?

The umpire, having found the breach of contract, found further the following among other facts—that at the date of the breach the market price of the coal in F question was 23s. 6d.; that about Oct. 28, 1911, the appellants sold, through one Colonna, their agent at Genoa, a cargo of coal to one Ghiron on the terms of a sale note of that date, which I shall call the broker's note, at the price of 19s. per ton, that the intention of the appellants was to resell to Ghiron the November cargo to be delivered to them by the respondents, and that they appropriated this cargo to their contract with Ghiron; that about Oct. 31, 1911, the appellants sent to Ghiron G a sold note dated Oct. 28, 1911; that about Nov. 28 in the same year Ghiron sold to the respondents the cargo referred to in the broker's and sold notes at 20s. a ton, and by endorsement on the sold note ceded all his rights and liabilities under the contract with the appellants for £225, being 20s. per ton, or 1s. per ton above the price which he had agreed to pay to the appellants; that by certain letters which the umpire referred to, Ghiron had given notice to the appellants that he cancelled H the contract of the appellants with the respondents so far as it related to the November cargo, but that the appellants immediately repudiated Ghiron's right to so cancel. It was not found by the umpire, but was agreed between counsel at the hearing before the learned judge who heard the case, BAILHACHE, J., that Ghiron signed and returned to the appellants a bought note, dated Oct. 28, corresponding to the sold note referred to. I

The contention of the appellants before the umpire was that the true measure of damages was 7s. 3d. per ton, being the difference in price between 16s. 3d., the contract price, and 23s. 6d., the market price at the date of the breach; 4,500 tons at 7s. 3d. amounts to £1,631 5s. The contention of the respondents was that the true measure of damages was 2s. 9d. per ton, being the difference between 16s. 3d., the contract price, and 19s., the price of the coals sold by the appellants to Ghiron; 4,500 tons at 2s. 9d. amounts to £618 15s. The umpire stated his award in the form of a Special Case under the provisions of the Arbitration Act, 1889. He appended,

among other documents, those to which I have referred. He also in his award expressed the opinion that

> "it is in accordance with trade equity and fair dealing that [the respondents] should be entitled to purchase the said P. Ghiron's contract with [the appellants,] and cancel the whole transaction, paying the differences in prices as was purported to be done."

BAILHACHE, J., decided in favour of the appellants. He pointed out that, although the broker's note was silent on this point, the sold note, which was signed and returned by Ghiron, the purchaser, contained an additional term. It stipulated that the "sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them" from the respondents. He would, but for this term, have held that the respondents had the right to say to the appellants that the latter, who had not delivered to them the cargo which they had re-sold to Ghiron, the assignor of the respondents, were liable to the respondents for the difference between 19s. and 23s. 6d., as the umpire had found. But he thought that under the additional term incorporated in the sold note the appellants had no obligation to deliver unless they had first got delivery from the respondents, and that as they had not got such delivery the cross claim of the respondents failed. For the rest, he thought that in ascertaining the measure of damages he ought to follow the judgment in *Rodocanachi* v. *Milburn* (1). The majority in the Court of Appeal (VAUGHAN WILLIAMS, L.J., and BRAY, J.) took a different view. Following the finding of the umpire, they considered that the sold note given by the broker, Colonna, governed the contract, and that, as it did not contain the additional term which BAILHACHE, J., had thought decisive, making the obligation of the appellants to deliver to Ghiron conditional on their getting delivery under their contract with the respondents, the latter had, by their assignment from Ghiron, become assignees of an unqualified contract of sale and delivery by the appellants. They held that it was open to them to decide that, on the principle of avoiding circuity of action, the amount which the respondents were thus entitled to recover from the appellants, being damages respresenting the difference between 19s., Ghiron's contract price, and 23s. 6d., the market price, must be deducted from the difference between 16s. 3d. and 23s. 6d. They, therefore, gave judgment to the effect that the amount due to the appellants was the sum of £618 15s. only, instead of £1,631 5s. which they had claimed. HAMILTON, L.J., dissented. He agreed that BAILHACHE, J., was wrong in departing from the finding of the umpire that the broker's note given by Colonna governed the transaction of Oct. 28. But he was unable to agree with his colleagues that the respondents so stood in the shoes of Ghiron, that, if the appellants failed to deliver to them, the respondents could claim against them the excess over the 19s. per ton at which Ghiron had bought. He considered that as no coals had been shipped by the respondents and appropriated to their contract, no property of any kind passed, but the right remained a contractual one in respect of unascertained goods. He pointed out the divergences between the terms of Colonna's contract note and those of the original contract between the appellants and the respondents, and further that there was no finding in the award of an assignment of the original contract to the respondents. He went on to add that no such case appeared to have been either raised before the umpire or established by his award. All that the umpire had really decided was a question as to the measure of the damages payable by the respondents to the appellants for the breach of their original contract, and as to this it appeared on the face of the Special Case that he had suggested an opinion as to the proper measure of damages which is inconsistent with the law as laid down in *Rodocanachi* v. *Milburn* (1).

I have arrived at the conclusion that the view taken by HAMILTON, L.J., was the true one. It may be that we are precluded by the terms of the award from looking beyond its finding that the contract between the appellants and Ghiron was contained in the Colonna sold note. But the result is carried no further by the statement in the award that the appellants "appropriated" the cargo they had the right to

claim to their contract with Ghiron. No doubt it must be taken that they intended to re-sell it to the latter. But what difference can this make? No property in the cargo had passed to them. Their right remained in contract, and was a right to damages. It appears to me to have primâ facie remained intact, and if *Rodocanachi* v. *Milburn* (1) was correctly decided it was quite clear what they were entitled to claim. No doubt if they had assigned their contract to Ghiron, and Ghiron had in his turn assigned it to the respondents, the appellants' right would have been extinguished. But there is no finding to this effect in the award, and if I were at liberty to look for such a result outside the award I should be of opinion that on the materials before us it was impossible to hold that such an assignment had been made. What really appears is that there were two separate contracts, on one of which the appellants were entitled to sue the respondents, and on the other of which the respondents could claim against the appellants. But the difference is that while as regards the first contract the respondents, who have been found to be in breach, have no answer, on the second there may or may not be a defence on the ground that this contract was to be satisfied out of the coal which the respondents failed to deliver. On this point I express no opinion. It was not before us, and it was not before the umpire. Nor would he have had jurisdiction to deal with it. What was referable to him under the original contract was any dispute as to

> "meaning of any of the conditions thereof, or as to any matter arising out of this contract."

Indeed, his award purports to deal with the obligation of the respondents to deliver, and the measure of damages alone. If it is argued that he could have dealt with a question of the effect of any assignment which he had found as a fact in extinguishing pro tanto the title of the appellants to sue for a breach, the obvious comment is, first, that he found no such assignment, and, secondly, that in the absence of such an assignment the question is, not one of reduction of the amount of damages, but one of a cross-action or counterclaim. Now, he deals with nothing of this kind, nor, in my opinion, would he have had jurisdiction to deal with it. What right, if any, the respondents may have, they must, therefore, assert in other proceedings. For these reasons I have arrived at the same result on this point as HAMILTON, L.J.

But a wholly distinct point was taken in addition to the one I have now discussed. It was argued for the respondents that, even assuming the appellants to be entitled to claim full damages from the respondents without deduction, the principle laid down by the Court of Appeal in *Rodocanachi* v. *Milburn* (1) which was accepted by the courts below as binding them, was wrong. In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by LORD ESHER he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance a contract entered into by the plaintiff with a third party. He said that if the plaintiff had sold the goods before the breach for more than the market price at that date he could not recover on that footing, and that it would, therefore, be unjust if the market price did not govern when he had sold for less. This decision is quite in harmony with what was recently said in this House in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Rail. of London, Ltd.* (2) where it was pointed out that a subsequent transaction, if it is to be taken into account in mitigating damages, must be one which arises out of transactions naturally attributable to the consequences of the breach, and must not be of an independent character. I agree with the statement of the law in *Rodocanachi* v. *Milburn* (1) and with the view of this part of the present case taken by all the learned judges in the courts below.

I will only add on this point that I do not think that the law so laid down has been affected by s. 51 of the Sale of Goods Act, 1893. By sub-s. (3) of the section

A the general principle is recognised as the rule which obtains primâ facie, and I do not find in sub.-s. (2) anything inconsistent with this recognition. For the reasons I have given, I move that the judgment of the Court of Appeal be reversed and that of BAILHACHE, J., restored. The respondents must pay the costs in this House and in the courts below.

B **LORD DUNEDIN.**—This is an appeal arising upon an award put in the form of a Special Case. [HIS LORDSHIP stated the facts]. I will assume that the contract between Ghiron and Messrs. Williams is contained in the Colonna note above. I am not satisfied of that. I am inclined to the view that though the umpire stated that as a question of fact, he was in reality deciding a question of law—viz., that the Colonna note was not superseded by the formal bought and sold notes, and if C so, that he may be corrected. But as there is difference of opinion on this point I will pass it by, and assume that the Colonna note rules. I dismiss at once all argument founded on the expression "cede the original contract" and the affected cancellation by Ghiron of Agius' contract with Messrs. Williams. Not only do I entirely agree with HAMILTON, L.J., that we should require to know a great deal more as to the true legal significance of the Italian word which is represented by D "cede," but what is conclusive is that, if there was assignation of the original contract, then Messrs. Williams had nothing left on which they could sue. Such a plea was never taken before the arbitrators, and the whole course of the arbitration is negative of its existence.

What, then, is the position? Messrs. Williams have an action for breach of contract against Agius. Ghiron has an action for breach of contract against Messrs. E Williams. Now, if *Rodocanachi* v. *Milburn* (1) be good law, then Williams' damages as against Agius are to be measured by the difference of market price, unaffected by the fact that Williams had contracted to re-sell. But then it is said that, even if that be so, yet inasmuch as Agius is in right as assignee of Ghiron's contract, he is entitled to make good his position without circuity of action as defence to the action brought against him. It is obvious that this is counterclaim, F and nothing else. How far counterclaim is available as defence is truly a matter of pleading. Different systems of law vary as to this power, and the same system of law will be found to vary at different dates of its development. But this at least is certain, that no counterclaim can be given effect to as a defence unless the court dealing with the original action has also jurisdiction in the matter of the counterclaim. Here the court, dealing with the original action, viz., the arbitrators G and umpire, only derives its jurisdiction from consent, and that consent is limited to matters arising out of the Agius-Williams contract. It has no jurisdiction whatever in the matter of the contract between Williams and Ghiron—and Agius can have no higher rights in respect of that contract than those possessed by his assignor, Ghiron. This consideration is, in my opinion, fatal to the conclusion reached by the majority of the Appeal Court.

H It was, however, argued at your Lordships' Bar that *Rodocanachi* v. *Milburn* (1) was wrongly decided, and it was said to be in conflict with the principles laid down in the recent case before the Privy Council of *Wertheim* v. *Chicoutimi Pulp Co.* (3). It is certain that LORD ATKINSON, who delivered the judgment in that case, did not think that he was going against *Rodocanachi* v. *Milburn* (1) for he says so in terms. Nor, in my mind, is there any discrepancy between the two judg- I ments. *Wertheim* v. *Chicoutimi Pulp Co.* (3) was a case, not of delivery withheld, but of delivery delayed. The buyer, therefore, got the goods, and the only damage he had suffered was in delay. Delay might have prejudiced him; the amount of prejudice was no longer a matter of speculation, it had been put to the test by the goods being actually sold, and he was rightly, as I think, only held entitled to recover the difference between the market price at the date of due delivery and the price he actually got. But when there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date.

That position is the position of a man who has goods at the market price of the day —and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price: *Great Western Rail. Co.* v. *Redmayne* (4), nor can he take benefit of the fact that the buyer has made a forward re-sale at under the market price. The general principle is expressed by the learned judges in both cases in identical words. ERLE, C.J., WILLES, KEATING, and MONTAGUE SMITH, JJ., in *Great Western Rail. Co.* v. *Redmayne* (4) say (L.R. 1 C.P. at p. 330):

"The market value of the goods was their value in the market, independently of any circumstances peculiar to the plaintiff [the buyer]."

And the very same phrase is used in the counter-case of *Rodocanachi* v. *Milburn* (1) by ESHER, M.R. (18 Q.B.D. at pp. 76, 77) and LOPES, L.J. (ibid. at p. 80). LINDLEY, L.J., says that there is no difference between the two cases.

The truth is that the respondents' argument leaves them in a dilemma. Either the sub-sale was for the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns. I am, therefore, of opinion that the appeal should be allowed, and the judgment of BAILHACHE, J., restored.

LORD ATKINSON expressed the opinion that on the face of the award the umpire had dealt with matters relating to the transaction between the appellants and Ghiron which, he said, could not be said to be "matters arising out of" the original contract between the appellants and the respondents within the meaning of the arbitration clause in that contract, and with regard to the point which calls for report in this case he said: BAILHACHE, J., was of opinion that the contention of the appellants was right, and that the sum of £1,631 5s., with the interest mentioned, should be awarded to the appellants. HAMILTON, L.J., concurred in that result. I agree with them. I think there is nothing in the case to make the principle of the decision in *Rodoconachi* v. *Milburn* (1) inapplicable to it, and that it is governed by that authority, the soundness of which has been many times recognised and never questioned. The case has, of course, no reference whatever to cases of late delivery of goods purchased, as distinguished from their non-delivery. On the whole, therefore, I am of opinion that the decision of the Court or Appeal was erroneous and should be reversed, and the decision of BAILHACHE, J., restored, and that this appeal should be allowed with costs.

LORD MOULTON.—The question for the decision of your Lordships in this appeal is set out very plainly in the award in the form of a Special Case, which forms the basis of this litigation. It is whether the appellants are right in their contention that the measure of damages put forward by them in respect of the admitted breach by the respondents of the contract to deliver a cargo of coals in November, 1910, is correct. That contention is that the proper measure of damages is the difference between the contract price of 16s. 3d. per ton and the market price on the date of the breach of contract, which the arbitrator finds to be 23s. 6d. per ton. Inasmuch as this is a plain case of a failure to deliver a specified quantity of an article obtainable in the market, the measure of damages is well established.

A The case comes under the rule laid down in *Rodocanachi* v. *Milburn* (1), and regularly and repeatedly followed ever since, and ultimately embodied in the Sale of Goods Act, 1893, s. 51 (3). The contention of the appellants is in accordance with that rule, and the question put to the court in the Special Case must, accordingly, be answered in their favour.

This consideration is, in my opinion, sufficient to decide this appeal, but in B deference to the opinions expressed by the majority of the Court of Appeal, I propose to examine the matters which it is suggested make the measure of damages in the present case other than that given by the recognised rule to which I have already referred. From the facts of the case as found in the award, and the documents therein referred to, we learn that the appellants made a contract to sell a cargo of coal to the Italian firm of P. Ghiron, and that they intended to fulfil that C contract by the cargo to be delivered by the respondents in November. The price to be paid by the said P. Ghiron was 19s. per ton, and the respondents contend that it is the difference between 19s. per ton and the contract price of 16s. 3d. per ton which is the true measure of damages. If these were the only facts of the case, the contention of the respondents would be precisely that view of the damages in the case of an article purchasable in the market which was negatived by the D decision in *Rodocanachi* v. *Milburn* (1). That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. To do so, he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two E prices. This difference, is, therefore, the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled. But the respondents contend that there are certain further facts which are relevant to the dispute before the arbitrator, and which afford an answer to the above reasoning. To appreciate them it will be necessary to give in a little detail the circumstance attending and subsequent to the F sale to P. Ghiron.

[HIS LORDSHIP examined the transactions between the appellants and Ghiron, and concluded:] There is, however, one overriding consideration which makes it immaterial to consider what would have been the position of the parties if there had been any assignment [of the contract between the appellants and Ghiron]. The tribunal before whom the parties appeared derived its authority from the arbitra- G tion clause contained in the original contract of sale between appellants and respondents, and it had no authority to decide any matters other than those "arising out of" that contract. The question whether subsequently to the making of that contract there was in fact any assignment of any portion of the rights under that contract to P. Ghiron is a matter entirely outside the scope of the arbitration, and the arbitrator had no jurisdiction to deal with it. The claim of the respondents to H diminish the damages legally due under the contract is of the nature of a counterclaim based on rights acquired subsequently to the contract by transactions with third parties. Whether or no in the courts of the realm such matters could be brought in as an answer pro tanto to the appellants' claim with a view to avoid circuity of action is immaterial. No such course is permissible to a domestic tribunal of limited authority. The arbitrator ought, therefore, to have refused to go I into any of the matters relating to the transactions between respondents and P. Ghiron, and to have confined himself to deciding the measure of damages under the contract independently of all such questions. I am of opinion, therefore, that this appeal should be allowed, and that the appellants should have the costs here and in the courts below.

LORD PARKER OF WADDINGTON.—My lords, I concur.

Solicitors: *Ince, Colt, Ince & Roscoe*, for *A. M. Jackson & Co.*, Hull; *Lowless & Co.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

JOSEPH TRAVERS AND SONS, LTD. *v.* COOPER

[Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.), July 1, 2, 3, 31, 1914]

[Reported [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; B
30 T.L.R. 703, 12 Asp.M.L.C. 561; 20 Com. Cas. 44]

Bailment—Carriage of goods—Special contract—Carrier not responsible "for any damage to goods, however caused"—Goods damaged through carrier's negligence—Liability.

By a contract made between the plaintiffs, the owners of goods, and the C
defendant, a wharfinger and lighterman, it was provided: "I [the lighterman] will not be responsible for any damage to goods, however caused, which can be covered by insurance." A lighter in which were the plaintiff's goods was left unattended by a servant of the defendant and in his absence became submerged, possibly by either underpinning or mud-suction, with the result that the goods were damaged. In an action by the plaintiffs for damages for the loss D
of and damage to the goods,

Held: (i) the burden lay on the defendant of proving that the loss was not due to the negligence of his servant, he had failed to discharge that burden, and, therefore, was guilty of negligence; (ii) the exemption clause, however, was so worded as, according to the natural and plain interpretation of its language, clearly to comprehend and exclude all loss and damage however it E
might have been caused, and, therefore, the defendant had protected himself against liability for the loss and the plaintiffs were not entitled to recover.

Per Phillimore, L.J.: When the bailee of goods has to admit that the goods have been damaged while in his custody, and in the absence of their custodian, and it is found that the absence was improper and negligent, and that very absence makes it difficult to determine what was the cause of the damage, and F
the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage.

Notes. Considered: *Coldman* v. *Hill*, [1918–1919] All E.R.Rep. 434; Distinguished: *The Santa Catherina* (1919), 8 L.J.P. 170. Considered: *Layton & Co.* G
v. *General Steam Navigation Co.* (1923), 130 L.T. 662; *Turner* v. *Civil Service Supply Association*, [1926] 1 K.B. 50; *Gosse Millard* v. *Canadian Government Merchant Marine*, *American Can Co.* v. *Canadian Government Merchant Marine*, [1927] 2 K.B. 432; *Calico Printers' Association, Ltd.* v. *Barclays Bank* (1930), 145 L.T. 51; *Aslan* v. *Imperial Airways, Ltd.*, [1933] All E.R.Rep. 567; *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 1 All E.R. 174; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine Steamship Line, Ltd.* [1940] 2 All E.R. 46. Applied: H
A. E. Farr, Ltd. v. *The Admiralty*, [1953] 2 All E.R. 512. Referred: *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.*, post; *Williams* v. *Curzon Syndicate* (1919), 35 T.L.R. 475; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R.Rep. 283; *Gibaud* v. *Great Eastern Rail Co.*, [1921] All E.R.Rep. 35; *Reynolds* v. *Boston Deep Sea Fishing and Ice Co.* (1921), 38 T.L.R. 22; *Rutter* v. *Palmer*, [1922] All E.R.Rep. 367; *Fagan* v. *Green and Edwards*, [1925] All I
E.R.Rep. 266; *Brooks Wharf and Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696.

As to the obligations of a bailee, see 2 Halsbury's Laws (3rd Edn.) 114–120, and as to special contracts of carriage, see ibid., vol. 4, p. 154 et seq. For cases see 3 Digest (Repl.) 76–90 and 7 Digest (Repl.) 39 et seq.

Cases referred to:

(1) *Tamvaco* v. *Timothy and Green* (1882), Cab. & El. 1; 8 Digest (Rep. 1) 5, *1*.

(2) *Liver Alkali Co.* v. *Johnson* (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch.; 8 Digest (Repl.) 10, *38*.

(3) *Chattock & Co.* v. *Bellamy & Co.* (1895), 64 L.J.Q.B. 250; 15 R. 340; 8 Digest (Repl.) 9, *34*.

(4) *Consolidated Tea and Lands Co.* v. *Oliver's Wharf*, [1910] 2 K.B. 395; 79 L.J.K.B. 395; 102 L.T. 648; 26 T.L.R. 388; 54 Sol. Jo. 506; 15 Com. Cas. 212; 8 Digest (Repl.) 9, *35*.

(5) *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp.M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, *2609*.

(6) *Price & Co.* v. *Union Lighterage Co.*, [1903] 1 K.B. 750; 72 L.J.K.B. 374; 88 L.T. 428; 19 T.L.R. 328; 8 Com. Cas. 155; affirmed [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 8 Digest (Repl.) 46, *277*.

(7) *Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.*, [1907] 1 K.B. 769; 76 L.J.K.B. 411; 96 L.T. 402; 23 T.L.R. 302; 10 Asp.M.L.C. 390; affirmed sub nom. *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp.M.L.C. 581; 13 Com. Cas. 104, H.L.; 41 Digest 474, *3056*.

(8) *Sutton & Co.* v. *Ciceri & Co.* (1890), 15 App. Cas. 144; 62 L.T. 742, H.L.; 8 Digest (Repl.) 47, *282*.

(9) *The Pearlmoor*, [1904] P. 286; 73 L.J.P. 50; 90 L.T. 319; 20 T.L.R. 199; 9 Asp.M.L.C. 540; 41 Digest 426, *2678*.

(10) *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1851), 16 Q.B. 600; 20 L.J.Q.B. 440; 15 Jur. 670; subsequent proceedings (1852), 10 C.B. 454, 7 Ry. & Can. Cas. 300; 21 L.J.C.P. 179; 19 L.T.O.S. 256; 16 Jur. 763; 138 E.R. 181; 8 Digest (Repl.) 146, *933*.

(11) *Great Northern Rail. Co.* v. *Morville* (1852), 621 L.J.Q.B. 319; Cox, M. & H. 616; 7 Ry. & Can. Cas. 830; sub nom. *Morville* v. *Great Northern Rail. Co.*, 19 L.T.O.S. 140; 16 J.P. 696; 16 Jur. 528; 8 Digest (Repl.) 55, *361*.

(12) *Taubman* v. *Pacific Steam Navigation Co.* (1872), 26 L.T. 704; 1 Asp.M.L.C. 336; 8 Digest (Repl.) 138, *894*.

(13) *The Stella*, [1900] P. 161; 69 L.J.P. 70; 82 L.T. 390; 16 T.L.R. 306; 9 Asp.M.L.C. 66; 8 Digest (Repl.) 59, *389*.

(14) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (1883), 8 App. Cas. 703; 53 L.J.Q.B. 124; 50 L.T. 281; 48 J.P. 388; 32 W.R. 207, H.L.; 8 Digest (Repl.) 66, *441*.

(15) *Morison, Pollexfen, and Blair, Ltd.* v. *Walton*, May 10, 1909, H.L., unreported; 3 Digest (Repl.) 78, *163*.

(16) *Phipps* v. *New Claridge's Hotel, Ltd.* (1905), 22 T.L.R. 49; 3 Digest (Repl.) 78, *162*.

(17) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, *772*.

(18) *Barnabas* v. *Bersham Colliery Co.* (1910), 103 L.T. 513; 55 Sol. Jo. 63; 4 B.W.C.C. 119, H.L.; 34 Digest 325, *2656*.

(19) *Thompson* v. *Royal Mail Steam Packet Co.* (1875), 5 Asp.M.L.C. 190, n.; 8 Digest (Repl.) 138, *892*.

(20) *Haigh* v. *Royal Mail Steam Packet Co.* (1883), 52 L.J.Q.B. 641; 49 L.T. 802; 48 J.P. 230; 5 Asp.M.L.C. 189, C.A.; 8 Digest (Repl.) 113, *728*.

(21) *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.*, [1914] 2 K.B. 788; 83 L.J.K.B. 1321; 111 L.T. 41; 30 T.L.R. 430; 19 Com. Cas. 246; affirmed post; [1915] 2 K.B. 729; 84 L.J.K.B. 1235; 112 L.T. 1103; 31 T.L.R. 243; 13 Asp.M.L.C. 64; 20 Com. Cas. 259, C.A.; 41 Digest 976, *8660*.

Also referred to in argument:

Dollar v. *Greenfield* (1905), Times, May 19, H.L.; 3 Digest (Repl.) 98, *256*.

Giblin v. *McMullen* (1868), L.R. 2 P.C. 317; 5 Moo.P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 3 Digest (Repl.) 64, *60*.

Medawar v. *Grand Hotel Co.*, [1891] 2 Q.B. 11; 60 L.J.Q.B. 209; 64 L.T. 851; 55 J.P. 614; 7 T.L.R. 269, C.A.; 29 Digest 16, *201*.

Brid v. *Dale* (1837), 8 C. & P. 207; 2 Mood. & R. 80, N.P.; 8 Digest (Repl.) 6, *13*.

Finucane v. *Small* (1795), 1 Esp. 315; 3 Digest (Repl.) 76, *148*.

Peek v. *North Staffordshire Rail. Co.* (1863), 10 H.L.Cas. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 9 Jur.N.S. 914; 11 W.R. 1023; 11 E.R. 1109, H.L.; 8 Digest (Repl.) 60, *394*.

Ashendon v. *London, Brighton and South Coast Rail. Co.* (1880), 5 Ex.D. 190; 42 L.T. 586; 44 J.P. 203; 28 W.R. 511; 2 Digest (Repl.) 368, *474*.

Ajum Goolam Hossen & Co. v. *Union Marine Insurance Co., Hajee Cassim Joosub* v. *Ajum Goolam Hossen & Co.*, [1901] A.C. 362; 70 L.J.P.C. 34; 84 L.T. 366; 17 T.L.R. 376; 9 Asp.M.L.C. 167, P.C.; 29 Digest 195, *1547*.

The Glendarroch, [1894] P. 226; 63 L.J.P. 89; 70 L.T. 344; 10 T.L.R. 269; 38 Sol. Jo. 362; 7 Asp.M.L.C. 420; 6 R. 686, C.A.; 41 Digest 414, *2580*.

Appeal by plaintiffs from a decision of PICKFORD, J., in the Commercial Court, in an action in which the plaintiffs claimed from the defendant damages for loss of and damage to the plaintiff's goods.

The facts appear in the judgments.

Leck, K.C., and *F. D. MacKinnon* for the plaintiffs.

Roche, K.C., and *Cranstoun, K.C.*, for the defendant.

July 31, 1914. The following judgments were read.

BUCKLEY, L.J.—In this action the plaintiffs sue for damages sustained by the defendant's negligence in relation to the lighterage of goods by the lighter *Mabel*. The lighter was lying at night at the Aberdeen Wharf. The defendant left her unattended. The tide fell so that she took the ground; when the tide rose again she was either underpinned or mud-sucked, and failed to rise. The water got in, the barge was submerged, and the goods were damaged. The defendant was guilty of negligence in leaving her unattended, but he says that, assuming negligence, and assuming that the negligence caused the loss, he is not liable by reason of certain words in the contract. These words are:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance."

Before coming to any authorities, let me examine these words and see what they import. It is not every loss which is excluded by the words in question. The losses are confined to "any loss or damage which can be covered by insurance." This infers that there may be losses which cannot be covered by insurance. It may be that practically every loss can be covered by insurance, but this document evidently contemplates that within its meaning some cannot. The clause of immunity, therefore, is confined to certain losses—namely, losses which can be covered by insurance. The next step is to consider what are the losses or damages which this contractor would be under if he were not protected against them. For it is to such that the words must be addressed. For this purpose it is necessary to ascertain what the defendant's business was. Was he a common carrier or was he a person who came under the same liability as if he were a common carrier? It seems to me unnecessary to consider whether this defendant was a common carrier. If he has undertaken the liability of a common carrier, he stands in the same position as regards liability. The question whether he has undertaken such liability or not is, according to *Tamvaco* v. *Timothy and Green* (1), one of fact. He was a person who did not hold himself out as ready to carry goods for everyone, but he

A did, I think, hold himself out as a person ready to carry goods for reward for anyone who resorted to his wharf as a customer of himself as a wharfinger. All his bill-heads and stationery were headed with these words:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered
B by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman."

According to *Liver Alkali Co.* v. *Johnson* (2), such a person may incur the liability of a common carrier. As a lighterman he was, I think, a person who incurred the liability of a common carrier in respect of the goods he carried. *Chattock & Co.* v. *Bellamy & Co.* (3) and *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (4)
C are, no doubt, cases in which the question of fact was resolved the other way. In the last-mentioned case HAMILTON, J., thought that the wharfinger only occasionally rendered to the customer of the wharf the subsidiary service of collecting and carrying his goods from the import steamer, and on that ground held that he was not subject to the liability of a common carrier. The question is one of fact, and, looking at the business in the present case, it is to be resolved, I think, in favour of
D holding that the defendant undertook the liability of a common carrier.

This being so, the defendant's liability was not confined to the liability to take proper care of the goods and not to be negligent, but extended to a liability to carry the goods safe against all events except the act of God and the King's enemies. He was, therefore, under two liabilities—the one a liability for negligence and the other a liability, as it is commonly expressed, as an insurer. His position is similar
E to that of the shipowner who is under two liabilities—the one as insurer, arising from the fact that he is a carrier, and the latter a liability arising from the implied warranty of seaworthiness. This was much discussed in *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport* (5). In this position of affairs an intelligible meaning is at once given to the words of exemption, "loss or damage which can be covered by insurance." To the extent of his liability as insurer the contract
F relieved him from liability, but the contract leaves him liable for negligence.

In this state of things the decision in *Price & Co.* v. *Union Lighterage Co.* (6) is, I think, exactly in point. That decision may be summarised by saying that the contract is to be read as if it contained the words "I will use reasonable care and skill, and will be liable for negligence, but as to losses which can be covered by insurance and for which, but for contract to the contrary, I should be responsible
G to you as insurer, I am not liable for those. If you want to provide for them you must cover them by insurance." If the carrier, says WALTON, J., ([1903] 1 K.B. at p. 752), desires to exempt himself he must do so in express terms, plain, and unambiguous terms. The parties are to be taken as contracting with reference to losses which are the common misfortune of both to the exclusion of losses which are due to the fault of one, unless the contrary be so expressed. The decision in
H that case was approved and followed in *Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.* (7) where LORD COLLINS ([1907] 1 K.B. at p. 778) pointed to the same considerations as I have mentioned with reference to the use of the word "insurance." Again in *Sutton & Co.* v. *Ciceri & Co.* (8) LORD HERSCHELL (15 App. Cas. at p. 152) deals in the same way with the words "insurance risks," as to which he says that, where spoken of in contradistinction to freight, the words cannot have so
I extensive a meaning as to exempt the party from liability as an ordinary carrier. *The Pearlmoor* (9) is to the same effect.

We have, however, been referred to cases earlier in date than *Price & Co.* v. *Union Lighterage Co.* (6) in which a larger exemption has been allowed in cases in which there have occurred words such as "in any case" or "under any circumstances" or "however caused," words which did not occur in *Price & Co.* v. *Union Lighterage Co.* (6). They are mostly railway cases. The first, in 1851, *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (10) is not, I think, of general application. In that case the owner of the horses accepted under the contract an

obligation to see to the efficiency of the carriage before he allowed his horses to be placed therein. There was a special contract in the matter again in a second action between the same parties. In *Great Northern Rail. Co.* v. *Morville* (11) the words were "for any damage, however caused," but again the contract contained the terms of a special agreement in the matter. In *Taubman* v. *Pacific Steam Navigation Co.* (12) the words were "under any circumstances whatsoever." It was held that this covered a case of wilful default and misfeasance. In *The Stella* (13) the words were "however caused." GORELL BARNES, J., said that the condition was clearly one which excluded the company from liability for the accident in that case. But the point does not seem to have been argued. I doubt whether the decisions in *Taubman* v. *Pacific Steam Navigation Co.* (12) and *The Stella* (13) can stand with the decision in *Price & Co.* v. *Union Lighterage Co.* (6).

The case which creates most difficulty is that of *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14). The words there were "liability for loss or damage by delay in transit or from whatsoever cause arising." These were the words contained in the offer as made by the company. The document signed by Brown ran "free and relieve the railway company from all claim or liability for loss or damage," not adding "from whatsoever cause arising." But the case proceeded upon the footing that the words in the offer and not the more limited words in the acceptance were the words to be considered. The language of LORD BLACKBURN is this (8 A.C. at pp. 709, 710):

> "Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

These words, it will be noticed, contrast the liability as an insurer with the liability for negligence, and contrast them in a case in which there was not, as in the present case, a limited class of loss contemplated by the exemption clause in question. Had the words been, as in the present case: "I will not be responsible for insurance risks," inferring "I will be responsible for other risks," LORD BLACKBURN'S words would not, I think, apply. It is, moreover, to be borne in mind as regards all the railway cases, that they are cases in which a company enjoying a monopoly, but compellable to carry and covered by such a provision as is contained in s. 7 of the Railway & Canal Traffic Act, 1854, is the defendant in an action. The effect of s. 7 is that the company is liable for negligence notwithstanding notice to the contrary subject to a proviso that the company may make such conditions as the court shall find to be just and reasonable. Negligence, therefore, is within the subject-matter dealt with, and a condition which is found to be just and reasonable may possibly be imposed even in the matter of negligence. The railway cases are to be treated, I think, as being a class of their own.

The conclusion at which I arrive with regard to this clause is that it relieves the defendant from liability for loss falling within a certain class, and that the class is that of insurance risks in the ordinary meaning of that word as distinguished from liability for negligence. For these reasons I think that the defendant is not protected by the clause in question.

There arises, therefore, the question whether the plaintiffs have proved their case. They have proved negligence, but the learned judge has held that they

A fail because they have not proved that the negligence caused the loss. If the learned judge had enjoyed the assistance which we have of the decision of the House of Lords in *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15), I doubt whether he would have decided this point as he did. The language of LORD LOREBURN in that case seems to me to be directly in point. It was a case in which a fire float which was being towed was lost, and the reason why she sank was un-
B known because there was no one on board her as there ought to have been. LORD LOREBURN said:

> "Here is a bailee, who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him and which might have prevented the loss.
C And his breach of contract has the additional effect of making it impossible to ascertain with precision and difficult to discover at all what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause
D independent of his own wrongdoing, he must make that loss good." LORD HALSBURY said: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

That is, I think, precisely applicable to the present case. Upon the evidence
E there is the greatest difficulty in saying what happened, whether the barge was underpinned or whether she was mud-sucked. PICKFORD, J., thought that the evidence was more consistent with the latter than the former, and said (110 L.T. at p. 160):

> "I come to the conclusion that the evidence leads me to say that this arose
F from mud-sucking and not from being under-pinned."

But having to choose between the two theories, he said no more than that he was led to the one rather than to the other. What did take place it was impossible to prove, and the impossibility arose from the fact that the defendant neglected his obligation to keep a man in charge. The defendant, as bailee of the goods, is responsible for their return to their owner. If he failed to return them it rested
G upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and the loss would still have resulted. He has not discharged himself of that onus. *Phipps* v. *New Claridge's Hotel* (16), *Scott* v. *London Dock Co.* (17) are in point except that the question there was whether there was negligence or not, not whether the negli-
H gence caused the loss, and *Barnabas* v. *Bersham Colliery Co.* (18) contained, I think, nothing to the contrary. LORD LOREBURN, who gave judgment in the last-mentioned case, is the learned Lord from whom I have already cited in *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15). Upon this ground I think that the decision under appeal should be reversed, and judgment given for the plaintiffs.

I **KENNEDY, L.J.**—In this case there is no doubt that the defendant's servant, who ought to have been in attendance upon the lighter during the night in the course of which, through some cause or other, it became submerged with the valuable cargo of the plaintiffs on board, improperly absented himself, and that through this misconduct the defendant must be held guilty of negligence in regard to the property of the plaintiffs of which the defendant was bailee. PICKFORD, J., has so found, and upon the hearing of this appeal the defendant's counsel did not dispute the propriety of this finding of fact. The learned judge, nothwithstanding, gave judgment for the defendant, because he held that it was not proved by the

plaintiffs that the submersion of the lighter with her cargo was attributable to this negligence.

Two causes of submersion were suggested, "mud-sucking" and "underpinning." The learned judge said that there were the greatest possible difficulties in preferring one of those theories to the other, but he came to the conclusion that the difficulties in the way in regard to underpinning were greater than those which were involved in the "mud-sucking" solution. Thereupon, if it be assumed that the cause of the submersion was "mud-sucking," came the further question: Might the submersion have been prevented if the defendant's lighterman had not absented himself? The learned judge held that it was not proved to him that, if the defendant's servant had been there, he could have prevented the accident, and, therefore, although, as he says, he did not like to free the defendant from the consequence of what he thought was negligence, he came to the conclusion that it was not shown that the defendant's negligence was the cause of the accident. It is clear that the propriety of this result depends upon a view as to the burden of proof that in such a case that burden lies upon the plaintiff. PICKFORD, J., said:

"Mr. Leck [counsel for the plaintiffs] argued that once I find negligence it is for the defendant to prove conclusively that the negligence could not have been the cause of the accident—that is to say to prove conclusively that the man could not have done anything to free the barge. I do not think that is the right point of view. I think that in this case, just as in any other, it is for the plaintiffs to prove that the negligence which occurred was the cause of the accident. . . . I have no evidence before me at all to lead me to conclude that if the man had been there he would have obtained assistance of any kind, and therefore, as I say with some regret, because I do not like to free the defendant from the consequences of what I think was negligence, I come to the conclusion that it is not shown that negligence was the cause of the accident."

With due deference I must say that I am unable to concur in this treatment of the burden of proof in such circumstances. I agree with counsel for the plaintiffs that the burden of disproof rested upon the defendant. We have properly been referred by the plaintiffs' counsel to the opinions expressed in the House of Lords by LORD LOREBURN, L.C., and LORD HALSBURY in the unreported case of *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15). A copy of the shorthand notes of the proceedings has been supplied to us. There, as here, the claim was by a bailor against a bailee. LORD LOREBURN said:

> "Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discern at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his wrongdoing, he must make that loss good."

And LORD HALSBURY:

> "It appears to me that there was a bailment made to a particular person—a bailment for hire and reward—and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment. The proof of that rested upon him."

If the decision in this appeal depended simply upon this question of the burden of proof, this court would have to consider whether it could properly, upon the evidence already taken, give judgment for the plaintiffs, or should order a new trial. But, independently and outside of it, there is an important question of law in regard to the terms of the contract of carriage which the defendant's

counsel have very fully argued in this court, as they were entitled to do, although it is clear that it was not much discussed before my brother PICKFORD in the court below. He states the view which he was inclined to prefer, but he did not give any definite judgment upon the point. The defendant relies upon a certain condition in the contract as exonerating him from liability for negligence. The learned judge, while, as I have said, expressly stating that it was unnecessary for him to decide it, because he held it was not proved that the defendant's negligence caused the loss and damage sued for, stated also, adversely to the defendant, that if he had to decide the point his inclination would be to hold that the condition in the contract did not cover the defendant and did not protect him from liability.

This point of contractual liability arises in the following way. The defendant, who is a warehouseman, also undertakes for reward lighterage for his customers. He performs this lighterage sometimes in barges of his own and sometimes in hired barges. He undertook such lighterage in the case of the plaintiffs' goods on this occasion upon the terms of a written notice in the following words:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft, and are made without recourse to lighterman."

The question is whether the terms of this condition are such as to protect the defendant from liability for the loss of or damage to the plaintiffs' goods, if such loss or damage was caused by the negligence of the defendant's servant in charge of the lighter and the plaintiffs' goods on board of it. In dealing with this question, it is not necessary to decide whether, apart from the special condition, the liability of the defendant as a lighterman would or would not have been analogous to that of a common carrier according to the doctrine laid down by the Exchequer Chamber in 1874 in *Liver Alkali Co.* v. *Johnson* (2). I incline to think that it was. The decision of HAMILTON, J., in *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (4), which was cited to us in support of a different view, may, I think, be distinguished on the facts. The warehousing firm in that case owned no lighters, and, while in some cases conveying a customer's goods in a hired lighter from ship to wharf, made no charge for that, but had a uniform rate, called a management rate, from which no abatement was made in cases in which the customer did his own lightering.

In the present case the defendant, though it appears from the evidence that he lighters only for customers who employ his services as a warehouseman, also appears from the terms of the notice which I have quoted to undertake lighterage and to make a charge for that particular service. In the absence of an express contract between the parties, the measure of the liability of a warehouseman who undertakes the lighterage of a customer's goods must, I think, depend upon the inference to be drawn from the particular facts in each case. In *Tamvaco* v. *Timothy and Green* (1) in the year 1882, tried before CAVE, J., sitting with a London special jury in Guildhall, the facts were that the defendants, who were wharfingers in the Thames, carried in a lighter for the plaintiffs, their customers, certain rice in a barge, which stuck in the mud, whereby the rice was injured. They made one common charge for carrying and warehousing. CAVE, J., left the question of the terms of the contract of carriage, which were not the subject of any express agreement, but had to be inferred from these arrangements, to the jury, and they, after hearing the matter argued by very eminent counsel, found by their verdict that it was understood between the plaintiffs and the defendants when the agreement was made as to these goods that the defendants should undertake the liability of common carriers. In the present case, whether he had the larger liability of a common carrier or not, there can be no doubt that the defendant had at least the duty not to be negligent in regard to the carriage of the goods in his lighter, and he was negligent.

Is he protected by the terms of the special contract from the consequences of that negligence to the owner of the goods? But for the words "however caused," I am of opinion that he would not be, and that the decision of this court in *Price & Co.* v. *Union Lighterage Co.* (6) affirming the judgment of WALTON, J., which is referred to by PICKFORD, J., in his judgment in the present case, would bind us so to hold. In that case, however, there were no such words as "however caused." The contract of carriage exempted from liability only "for any loss or damage to goods which can be covered by insurance." There were no words referring to causation. Counsel for the defendant, in his full and able argument, has satisfied me that the presence of such words creates an essential difference, and that, while it is settled law that a contractual exemption, whether from loss or damage generally or from certain enumerated forms of loss or damage (such, e.g., as collisions, stranding and other perils), will not be read as protecting the carrier from liability for loss or damage if the loss or damage is proved to arise from the carrier's negligence and that the words "for any loss or damage to goods which can be covered by insurance" do not operate to enlarge the exemption, as appears from the case to which I have just referred, a different position in regard to the carrier's liability is created if the exemption clause is so worded as, according to the natural and plain interpretation of its language, clearly to comprehend all loss or damage, however that loss or damage may originate.

The general principle was laid down by LORD BLACKBURN in *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14) (8 A.C. at pp. 709, 710):

> "When an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, 'perils of the seas excepted.' Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, 'I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage.' And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage, however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

So a protective effect against the consequence of the carrier's negligence has been given to an exemption clause in 1872 in *Taubman* v. *Pacific Steam Navigation Co.* (12) where the words were "under any circumstances whatever"; in 1875, in *Thompson* v. *Royal Mail Steam Packet Co.* (19), where the words were "under any circumstances"; in 1883, in *Haigh* v. *Royal Mail Steam Packet Co.* (20), "in any circumstances"; in *The Stella* (13), where the words were "any injury howsoever caused"; and quite recently by BAILHACHE, J., in *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.* (21), where the words were "whatever be the nature of such accident and damage or howsoever arising." In the present case the condition which we have to consider uses the very words of exemption referred to by LORD BLACKBURN in *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown* (14), "damage however caused", and I see no sufficient reason not to treat them as sufficient to protect the defendant from liability for the negligence of his servant in regard to the carriage of the plaintiff's goods. On this ground, therefore, while, for the reasons which I have stated, I respectfully differ from my brother PICKFORD in regard to the view which he has taken as to the burden of proof upon the question of negligence, I think that in the result the defendant is entitled to retain the judgment in his favour, and that this appeal should be dismissed.

PHILLIMORE, L.J.—The plaintiff company was the owner of a cargo of tinned salmon in cases which was shipped on board the defendant's lighter and was

damaged owing to the submergence of the lighter on a rising tide in the river Thames off Aberdeen Wharf about midnight between Jan. 9 and 10, 1913. The lighter was in charge of a lighterman who was absent from his post for a period beginning at 8.45 or 9 p.m. till about 12.30 a.m., by which time the mischief had been done. This absence was without justification, and has been rightly found by the learned judge who tried the case, PICKFORD, J., to have been an act of negligence. According to the terms of the contract of carriage, the defendant was not liable as an insurer, but he may be liable for the negligence of his servants.

The first question, therefore, to be determined is whether the loss can be imputed to the negligent absence of the lighterman from his post. [HIS LORDSHIP examined the evidence, said that PICKFORD, J., had held that it was not proved that the presence of the lighterman who had been left in charge would have prevented the loss, and, so holding, had given judgment for the defendant, and continued:] This gives rise to the question: On whom was the burden of proof? It is here that I differ from the learned judge. I think he has imposed the burden of proof on the wrong party. I think that, when the bailee of goods has to admit that the goods have been damaged while in his custody, and in the absence of their custodian, and it is found that the absence was improper and negligent, and that that very absence makes it difficult to determine what was the cause of the damage, and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage. As was said by LORD LOREBURN, L.C., *Morison, Pollexfen, and Blair, Ltd.* v. *Walton* (15):

> "It is for him to explain the loss himself, and, if he cannot satisfy the court that it occurred from some cause independent of his own wrongdoing, he must make that loss good."

I think I should have come to the same conclusion rather as a matter of business and common sense than of law, if I had been unaided by this decision in the House of Lords. If, therefore, there were no point upon the contract, I should think that the plaintiff company were entitled to recover; but there is a point upon the contract, on which provisionally PICKFORD, J., took a view unfavourable to the defendant, but which it was unnecessary for him to determine. This now becomes of importance.

The defendant is a wharfinger as well as a lighterman, and his business as a lighterman is subordinate or ancillary to his business as a wharfinger. He received these goods to carry them for storage at his wharf, upon terms which are contained in a printed notice appended to all his letters and invoices, of which the plaintiff company had notice, and which must be deemed to form part of the contract. These terms are thus expressed:

> "The rates charged by me for lighterage are for conveyance only. I will not be responsible for any loss of or damage to goods, however caused, which can be covered by insurance. Merchants are advised to see that their policies cover risk of craft and are made without recourse to lighterman."

Thereupon the question arises whether by this language he has stipulated that he shall not be liable for a loss which may be due to the negligence of his servants. The words "any loss, however caused," are large enough to include a loss due to negligence, but it is said that a series of decisions have put a limited construction upon these general words.

Before proceeding to determine the question of construction, it is desirable to see what would have been the defendant's position had there been no such clause. The plaintiff company contends that without such a clause the defendant would have been in the ordinary position of a barge owner who carries by water, or, at any rate, on the sea or tidal waters, which is that he has the liabilities of a common carrier, and is responsible for the safe delivery of the goods, being allowed

to set up no excuses except those called "the act of God" and "the King's enemies." The defendant contends on the authority of *Consolidated Tea and Lands Co.* v. *Oliver's Wharf* (4) and *Chattock & Co.* v. *Bellamy* (3) that he is not under this liability. In the two cases on which he relies the circumstances were very special. In *Chattock & Co.* v. *Bellamy* (3) there were other grounds for deciding in favour of the defendant, and it does not appear to me that either of them is a sufficient authority for the present case. The general rule is that the barge owner is liable. This was well established by *Liver Alkali Co.* v. *Johnson* (2). If there were sufficient circumstances in either of the two cases relied upon to take the particular contract of carriage out of the general rule, there are no sufficient circumstances in this case. If it be said that the difference between the circumstances in this case and the circumstances in those cases is slight, I reply that either it is sufficient or those decisions must be wrong.

I approach, therefore, the construction of the contract from the position that, without it, the barge owner would be liable for all losses except those occasioned by the "act of God" and the "King's enemies", so that the clause protecting him from liability for loss is wanted for protection in other cases besides those of negligence. Thus far I am in favour of the plaintiff company. But it remains that the words are wide enough to protect from loss by negligence. There have been two lines of decision as to general words of this nature. One line is conveniently represented by the decision in *Price & Co.* v. *Union Lighterage Co.* (6) to the effect that by such an exemption in general terms, not expressly relating to negligence, the barge owner is not exempt from liability for a loss caused by the negligence of his servants. This is well established for the words "any loss of or damage to goods," whether with or without the words "which can be covered by insurance." On the other hand, there is the decision in *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14), where the words "all liability for loss or damage by delay in transit or from whatever cause arising" were held to protect the railway company from liability for the negligence of their servants in accepting for carriage fish which they could not carry in time. Lord Blackburn in that case says (8 A.C. at pp. 709, 710):

> "Such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants . . . When a man says that he will not be responsible for damage, however caused, that is not to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants."

In *The Stella* (13) the same construction was given to a pass for a journey partly by railway and partly by sea, where the words were "the company are relieved from all responsibility for any injury, delay, loss, or damage, however caused." In that case the claim was twofold—for loss of life, but also for loss of luggage. An earlier decision—*Taubman* v. *Pacific Steam Navigation Co.* (12)—held that a stipulation that a shipowner would not be answerable for loss of baggage under any circumstances whatsoever covered wilful default or misfeasance by the defendant's servants.

How are these two lines of decision to be reconciled, and what principle is to be extracted from a comparison of them? It would be a good broad principle if one could say that, wherever the bailee has the liability of a common carrier, this clause would be satisfied by giving it the effect of relieving him from that liability, but making him still responsible for the absence of due care, while, on the other hand, where his only liability in the absence of written terms would be to take due care, then the words must be given a wider effect, on which principle the decision of Bailhache, J., in *Pyman Steamship Co.* v. *Hull and Barnsley Rail. Co.* (21) appears to rest. But railway companies have, in the absence of express contract, the liability of common carriers, and yet *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (14) gives what I may call the

A double effect to this clause, and shipowners have the same liability, and yet in *Taubman* v. *Pacific Steam Navigation Co.* (12) and in *The Stella* (13) the clause received a similar construction, so this broad principle will not hold. It was suggested that, where the clause takes the form that the barge owner will not be responsible for any loss which can be covered by insurance, the words "covered by insurance" point to a restriction, and mean any loss which the barge owner B would be liable for as an insurer. I cannot take this view. It is true that by a metaphor the carrier, in the absence of special contract, is called an insurer. He is not really an insurer. There is no contract of insurance. His liability omits two of the primary losses for which an ordinary underwriter makes himself liable, the "act of God" and the "King's enemies." The word "insurer" is borrowed as a convenient word for expressing his liability. Even if it were otherwise, the C expression is not: I will not be responsible "for any loss or damage for which I should be liable as an insurer," but "for any loss or damage which you can cover by insurance." Now the goods owner by insuring in the ordinary way covers himself against loss by perils of the seas howsoever caused, whether by negligence of the carrier's servants or otherwise. It seems to me that if these words "which can be covered by insurance" are to lend any colour, they intensify the force of the D words "any" and "however," "mind you, any and every loss, however caused, against which you can protect yourself by an ordinary insurance, so that if you lose you need not come upon me for recoupment."

This, then, is the distinction. It is a fine one, and I am sorry to think that it is so fine, but it seems to be this: If you say "any loss," you are directing attention to the kinds of losses and not to their cause or origin, and you have not E sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and, therefore, you have not brought home to the person who is intrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or even, possibly, for your own personal want of care. But if you direct attention to the causes of any loss; if you say "any loss," "however caused," or "under any circumstances," you give sufficient warning, and F it is not necessary to say in express terms "whether caused by my servants' negligence," or, in the bill of lading phrase, "neglect or default or otherwise." This seems to be indicated by the decision in *Haigh* v. *Royal Mail Steam Packet Co.* (20). The case itself is a decision upon a claim for loss of life, and, as shipowners may be said not to have the liabilities of common carriers in respect of passengers, it may not so far be to the point. It is true also that the case was mainly argued G upon the question whether the words "loss or damage" could be applied to human beings. But the analysis of the argument is as follows. To a claim by an executor for the loss of life of a passenger by reason of negligent navigation the defence was a clause in the ticket to the effect that the company would not be responsible for any loss or damage arising from any act, neglect or default whatH soever of the pilot, master, or mariners. To this it was replied that these were not apt words to cover loss of life. The defendant company rejoined that they could have no other meaning, for loss of luggage was covered by an earlier clause—viz.: "The company will not be responsible for any loss, damage, or detention of luggage under any circumstances." To this the plaintiff surrejoined, as it were, that these words were not large enough to cover loss or damage by any act, neglect, I or default of servants. The Court of Appeal held that they were large enough, that, therefore, the company was already protected against loss of luggage even by negligence, and that, accordingly, the words in the later clause must apply to loss of life or they would have no application. Further, the court gave its approval to the decision of the Court of Exchequer in an action by one Thompson against the same company, and dwelt upon the circumstances that the words "any loss" in an earlier form of the same company's ticket had been held to be insufficient, but the addition of the words "under any circumstances" made it sufficient. This is a direct approval of the view that, if the clause directs attention to the cause of

loss, and excludes all causes, it gives sufficient protection. I think this must be our guiding line, and that the judgment for the defendant was therefore right, and this appeal must be dismissed. A

Appeal dismissed.

Solicitors: *William A. Crump & Son; Keene, Marsland, Bryden & Besant.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*] B

C

POLURRIAN STEAMSHIP CO., LTD. *v.* YOUNG

D

[Court of Appeal (Lord Cozens-Hardy, M.R., Kennedy, L.J., and Warrington, J.), December 11, 14, 15, 1914, February 5, 1915]

[Reported [1915] 1 K.B. 922; 84 L.J.K.B. 1025; 112 L.T. 1053; 31 T.L.R. 211; 59 Sol. Jo. 285; 13 Asp.M.L.C. 59; 20 Com. Cas. 152]

Insurance—Marine Insurance—Constructive total loss—Need to prove unlikelihood of recovery of insured vessel—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60 (2) (*i*) (*a*). E

Before the passing of the Marine Insurance Act, 1906, to establish the constructive total loss of a vessel it was enough to show that her recovery was uncertain. The Act of 1906 was entitled: "An Act to codify the law relating to marine insurance," but if the court found that in plain and unambiguous language it had altered the pre-existing law the duty of the court was to decide in accordance with the change. Under s. 60 (2) (i) (a) there is a constructive total loss where the assured is deprived of the possession of his ship by a peril insured against and it is unlikely that he can recover the ship, and, therefore, since the enactment of that section, it is not sufficient, on a claim for a constructive total loss, for the assured to prove uncertainty of recovery; he must prove unlikelihood. F G

Notes. Considered: *Horlock* v. *Beal*, [1916–17] All E.R.Rep. 81. Applied: *Roura & Forgas* v. *Townend*, [1918–19] All E.R.Rep. 341. Considered: *Marstrand Fishing Co.* v. *Beer*, [1937] 1 All E.R. 158; *Czarnikow, Ltd.* v. *Java Sea and Fire Insurance Co., Leslie and Anderson, Ltd.* v. *Java Sea and Fire Insurance Co.*, [1941] 3 All E.R. 256. Referred to: *Sanday* v. *British and Foreign Marine Insurance Co.*, [1915] 2 K.B. 781; *Wilson Bobbin Co.* v. *Green* (1915), 31 T.L.R. 605; *Moore* v. *Evans*, [1917] 1 K.B. 458; *Cohen* v. *Standard Marine Insurance Co.* (1925), 30 Com. Cas. 139; *Green Star Shipping Co., Ltd.* v. *London Assurance Co.*, [1933] 1 K.B. 378; *Carras* v. *London and Scottish Assurance Corpn., Ltd.* (1935), 40 Com. Cas. 288; *Société Belge des Bretons Société Anonyme* v. *London and Lancashire Insurance Co.*, [1938] 2 All E.R. 305; *Rickards* v. *Forestal Land, Timber and Railways Co., Robertson* v. *Middows, Ltd., Kahn* v. *Howard Bros. & Co.*, [1941] 3 All E.R. 62; *Cook* v. *Gateshead Corpn.* (1944), 37 B.W.C.C. 106; *Rotherwell* v. *Caverswall Stone Co.* (1944), 171 L.T. 289; *Court Line, Ltd.* v. *R.*, [1945] 2 All E.R. 357; *Pesquerias Secaderos de Espana S.A.* v. *Beer* (1946), 175 L.T. 495. H I

As to constructive total loss, see 22 Halsbury's Laws (3rd Edn.) 149–159; and for cases see 29 Digest 268 et seq. For Marine Insurance Act, 1906, see 13 Halsbury's Statutes (2nd Edn.) 14.

Cases referred to:

(1) *Ruys* v. *Royal Exchange Assurance Corpn.*, [1897] 2 Q.B. 135; 66 L.J.Q.B. 534; 77 L.T. 23; 13 T.L.R. 444; 8 Asp.M.L.C. 294; 2 Com. Cas. 201; 29 Digest 266, *2146.*

(2) *Goss* v. *Withers* (1758), 2 Burr. 683; 2 Keny. 325; 97 E.R. 511; 29 Digest 272, *2207.*

(3) *Andersen* v. *Marten*, [1908] A.C. 334; 77 L.J.K.B. 950; 99 L.T. 254; 24 T.L.R. 775; 52 Sol. Jo. 680; 11 Asp.M.L.C. 85; 13 Com. Cas. 321, H.L.; 29 Digest 216, *1725.*

(4) *De Mattos* v. *Saunders* (1872), L.R. 7 C.P. 570; 27 L.T. 120; 20 W.R. 801; 1 Asp.M.L.C. 377; 29 Digest 241, *1943.*

(5) *Cossman* v. *West*, *Cossman* v. *British America Assurance Co.* (1887), 13 App. Cas. 160; 57 L.J.P.C. 17; 58 L.T. 122; 4 T.L.R. 65; 6 Asp.M.L.C. 233, P.C.; 29 Digest 254, *2054.*

(6) *Sailing Ship Blairmore Co.* v. *Macredie*, [1898] A.C. 593; 67 L.J.P.C. 96; 79 L.T. 217; 14 T.L.R. 513; 8 Asp.M.L.C. 429; 3 Com. Cas. 241; 24 R. 893, H.L.; 29 Digest 266, *2145.*

Also referred to in argument:

Hamilton v. *Mendes* (1761), 2 Burr. 1198; 1 Wm. Bl. 276; 97 E.R. 787; 29 Digest 273, *2208.*

Cologan v. *London Assurance Co.* (1816), 5 M. & S. 447; 105 E.R. 1114; 29 Digest 254, *2058.*

Dean v. *Hornby* (1854), 3 E. & B. 180; 2 C.L.R. 1519; 23 L.J.Q.B. 129; 22 L.T.O.S. 222; 18 Jur. 623; 2 W.R. 156; 118 E.R. 1108; 29 Digest 220, *1764.*

Lozano v. *Janson* (1859), 2 E. & E. 160; 28 L.J.Q.B. 337; 33 L.T.O.S. 270; 5 Jur.N.S. 1401; 7 W.R. 654; 121 E.R. 61; 29 Digest 267, *2148.*

Shepherd v. *Henderson* (1881), 7 App. Cas. 49, H.L.; 29 Digest 286, *2333.*

Cory v. *Burr* (1883), 8 App. Cas. 393; 52 L.J.Q.B. 657; 49 L.T. 78; 31 W.R. 894; 5 Asp.M.L.C. 109, H.L.; 29 Digest 217, *1736.*

Bank of England v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333; sub nom. *Vagliano* v. *Bank of England*, 55 J.P. 676, H.L.; 42 Digest 779, *2094.*

Robinson Gold Mining Co. v. *Alliance Insurance Co.* [1904] A.C. 359; 73 L.J.K.B. 898; 91 L.T. 202; 53 W.R. 160; 20 T.L.R. 645; 9 Com. Cas. 301, H.L.; 29 Digest 217, *1734.*

Rankin v. *Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp.M.L.C. 65, H.L.; 29 Digest 278, *2259.*

M'Iver v. *Henderson* (1816), 4 M. & S. 576; 105 E.R. 947; 29 Digest 266, *2143.*

Bainbridge v. *Neilson* (1808), 10 East, 329; 103 E.R. 800; 29 Digest 265, *2140.*

Mansell & Co. v. *Hoade* (1903), 20 T.L.R. 150; 29 Digest 277, *2246.*

Roux v. *Salvador* (1836), 3 Bing.N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest 263, *2129.*

Hall v. *Hayman*, [1912] 2 K.B. 5; 81 L.J.K.B. 509; 106 L.T. 142; 28 T.L.R. 171; 56 Sol. Jo. 205; 12 Asp.M.L.C. 158; 17 Com. Cas. 81; 29 Digest 271, *2188.*

Rodoconachi v. *Elliott* (1873), L.R. 8 C.P. 649; 42 L.J.C.P. 247; 28 L.T. 840; 2 Asp.M.L.C. 21; on appeal (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp.M.L.C. 399, Ex. Ch.; 29 Digest 218, *1747.*

Rotch v. *Edie* (1795), 6 Term Rep. 413; 101 E.R. 623; 29 Digest 277, *2241.*

Barker v. *Blakes* (1808), 9 East, 283; 103 E.R. 581; 29 Digest 284, *2315.*

Stringer v. *English and Scottish Marine Insurance Co.* (1870), L.R. 5 Q.B. 599; 10 B. & S. 770; 39 L.J.Q.B. 214; 22 L.T. 802; 18 W.R. 1201; 3 Mar.L.C. 440, Ex. Ch.; 29 Digest 255, *2067.*

Bolton v. *Gladstone* (1804), 5 East, 155; affirmed (1809), 2 Taunt. 85; 127 E.R. 1008; 29 Digest 184, *1419.*

Powell v. *Hyde* (1855), 5 E. & B. 607; 25 L.J.Q.B. 65; 26 L.T.O.S. 74; 2 Jur.N.S 87; 4 W.R. 51; 119 E.R. 606; 29 Digest 217, *1735.*

Appeal by the plaintiffs from a decision of PICKFORD, J., in an action by ship- A
owners on a policy of marine insurance claiming for the constructive total loss of the vessel insured.

The facts are stated in the judgment of the court.

Roche, K.C. (with him *Alexander Neilson*), for the assured.
Maurice Hill, K.C., and *R. A. Wright* for the insurer. B

Cur. adv. vult.

Feb. 5, 1915. The following judgment of the court was read by

WARRINGTON, J.—The question for our determination upon the appeal in this case is whether or not on Oct. 26, 1912, when the plaintiffs, the owners of the steamship *Polurrian*, gave notice of abandonment of that vessel to the defendant, C
the insurer, and are by agreement to be taken as having issued the writ in this action, the state of things was such as to entitle the plaintiffs to recover upon the policy of insurance as for a constructive total loss. PICKFORD, J., has dismissed the plaintiffs' claim, and the plaintiffs have appealed to this court against his decision. The policy of insurance, so far as its contents are material to the matter in dispute, covered the plaintiffs against the risks of capture, seizure, and D
detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. The plaintiffs allege, and the defendant denies, that on Oct. 26, 1912, there was a constructive total loss of the *Polurrian* by one of the perils thus insured against.

It is indisputable that according to the law of England, in deciding upon the E
validity of the claims of this nature between the assured and the insurer, the matters must be considered as they stood on the date of the commencement of the action. That is the governing date. If there then existed a right to maintain a claim for a constructive total loss by capture, that right would not be affected by a subsequent recovery or restoration of the insured vessel: see the judgment of COLLINS, J., in *Ruys* v. *Royal Exchange Assurance Corpn.* (1), which reviews the F
history of the law on this point. In strictness, therefore, in regard to the facts, I might, I think, confine myself for the purpose of this judgment to a statement of them as they stood on Oct. 26, which, as I have already said, is by agreement to be taken as the date of the issue of the writ in this action, and was also the date of the plaintiffs' notice of abandonment. As, however, the learned judge in the court below has in his judgment included a review of the events which occurred G
in reference to the *Polurrian* after she had been taken by the Greek naval forces out of the possession of the plaintiffs on Oct. 25, 1912, until her release seven weeks later on Dec. 8 and has drawn therefrom, in support of his conclusions, inferences more favourable to the defendants' case than do I venture with all respect to think the evidence warrants, I do not think it would be proper for me, having to consider that judgment, wholly to confine my reference to the facts to their position H
on Oct. 26. But that is the material date, and I shall deal with the later period as briefly as possible.

The *Polurrian*, laden with a cargo of Welsh coal and bound for Constantinople, was on Oct. 25, 1912, off the island of Tenedos. Her master, Mr. Jones, had known of the war between Italy and Turkey, which existed when the *Polurrian* started on her voyage, but had terminated before Oct. 25. He did not know that Greece was I
at war with Turkey. Off Tenedos the *Polurrian* was overhauled by Greek warships and taken by them to Mudros Bay, a harbour in the island of Lemnos, in which a portion of the Greek fleet was lying. The master, in the course of his interview with the Greek officer who had come on board the *Polurrian* when she was arrested, told the officer that he did not know of the war, and the order to follow the Greek destroyer to Mudros Bay was given after the officer had communicated by wireless telegraphy with the Greek admiral, with the result that he informed the master of the *Polurrian* "that he had orders to seize us; that he would have to convoy

A us to Mudros Bay, in the island of Lemnos." In the evening, after the *Polurrian* had anchored in the spot designated by an officer from the flagship, the master of the *Polurrian* was further interrogated as to his cargo and destination, the ship's papers were examined, and the master was told by the Greek officer (I quote the words textually from the shorthand notes) that

B "his country intended to confiscate the cargo, but they were not quite sure what they would do with the ship; but in the meantime the ship would be deemed a capture, although he personally did not think it could be maintained."

The master, either the same evening or the next day—the telegram is dated the 26th—telegraphed to the plaintiffs:

C "Arrived Mudros Bay, Lemnos Island, convoyed Greek destroyer. Now awaiting admiral's instructions. All well. Please inform families."

The next day the *Polurrian* was ordered alongside the flagship in order to coal her, and the master of the *Polurrian* had a conversation with the Greek admiral through an interpreter, the flag lieutenant, who spoke, says Mr. Jones, indifferent English, D in the course of which the master of the *Polurrian*, according to the account, told the admiral, in answer to questions as to his knowledge of hostilities between Greece and Turkey, that he had no knowledge of them. The conclusion of the interview, so far as regards the fate of the vessel as distinguished from her cargo, appears in the following question and the witness's answer thereto: "(Q.) Did he tell you at all what would ultimately be done with the ship?—(A.) No. With E regard to the ship he said he was not quite sure; it was a doubtful question; but that the question could be settled later on. In the meantime the capture of the vessel would be maintained and they would take the cargo."

This is the master's evidence as to facts in regard to Oct. 25 and 26, and I see no reason to doubt its substantial accuracy. But one important additional fact has to be added. Although the master of the *Polurrian* no doubt intended in his F interview with the Greek admiral to convey to him through the interpreter his ignorance of the existence of war between Greece and Turkey, it is quite plain that he conveyed in fact a very different impression. It is clear beyond doubt that the admiral understood him to admit that he did know of the war, and that, treating it as a serious admission, the admiral so informed his government at Athens, and that it was upon this ground that the government maintained the capture until G Dec. 8. I say that this is quite clear, because on Oct. 28 our Foreign Office, whose intervention had been invoked by the plaintiffs and the defendants, telegraphed to the plaintiffs:

"H.M. Minister at Athens reports Greek government maintain capture to be lawful. He has demanded reference to Prize Court."

H On the same day Mr. Henderson, the underwriters' agent at Athens, telegraphed to the Salvage Association, acting for the underwriters in London:

"*Polurrian*, Government considers prize, alleging captain admitted was aware declaration war. British Minister had informed Greek government vessel must come Piræus and matter decided by Prize Court here":

I see also the letter from Henderson at Athens to the Salvage Association in London, Oct. 28.

I have now stated, and, I hope, accurately stated, the facts as they existed on the material date, Oct. 26, 1912, the agreed date of the commencement of the present action, and the date on which the plaintiffs, having received from the master of the *Polurrian* at Mudros Bay the telegram which I have already set out, caused notice of abandonment on the ground of loss by capture to be given to the insurer. As it is, I think, for the reason which I have given, proper that I should deal with the subsequent history of the transaction it will be convenient, for the

sake of clearness, that I shall now complete the narrative before considering the legal rights of the parties to this litigation as they stood at that date. A few days after Oct. 26, and after the commencement of the discharge of the *Polurrian's* cargo into the Greek warships in Mudros Bay, the master had an interview with an officer whom he describes as the admiral's secretary. The master asked him as to the ship, and was told that the question of the ship would be settled by the government, and that he (the secretary) thought it would have to go to the Piræus. On Nov. 28, when the discharge was completed, the master of the *Polurrian* was ordered to proceed to the Piræus and there present himself at the general shipping office. He obeyed those orders, sailed to the Piræus, which he reached on Nov. 29, and was there directed by the captain of the port to await the instructions of the Minister of Marine. He was informed by the British Minister at Athens that the Greek admiral stated that he (Captain Jones) had admitted knowledge of the declaration of war before sailing, and that the Greek government was claiming that the *Polurrian* was a lawful prize; that a Prize Court was going to be held, and that he (Captain Jones) would have to give evidence. On Dec. 1 an armed guard was put on board by the Greek authorities, and by orders of the officer in command of the guard the *Polurrian*, with the guard on board, was navigated to the naval arsenal at Salamis, and there remained until her release on Dec. 8.

Meanwhile, from Oct. 28 onwards, the underwriters and the owners, without prejudice to their respective contentions as to the validity of the notice of abandonment, had continued vigorously and persistently through the Foreign Office in London and the British Minister at Athens, to press the Greek government for the release of the *Polurrian*. At one time during the first fortnight of November, it appeared likely that the application would succeed, so far, at any rate, as regards her release after her cargo had been discharged at Lemnos: see the correspondence of Nov. 1–14. But if the Greek government ever led our Minister at Athens, as it seems that they did, to suppose that such a course would be adopted, they altered their views on Nov. 15. The *Polurrian*, after her cargo had been taken out of her, was brought to the Piræus and thence to Salamis, with the intention that her case should be dealt with by a Prize Court. And on Dec. 4 Mr. Henderson, who, as I have already said, represented the interest of the underwriters at Athens, telegraphed to the Salvage Association in London:

> "*Polurrian* must go before the Prize Court on ground that captain made statement alleged knowing state of war. Court will be formed in about two days. Will cable later asking certain instructions."

There is in the correspondence a letter written from Athens on Dec. 5 by the same gentleman to the like effect. On Dec. 8 the Greek government released the *Polurrian*. It appears from a letter from Messrs. Harris and Dixon, Ltd., to the plaintiffs, dated Dec. 9 and referring to a communication just received in London from Lloyds' agent at Athens, that the government did so after submitting the question to the Legal Council of State, "who decided no capture under art. 43 of the Declaration of London." On Oct. 15, 1913, the Greek Administrative Prize Court rejected the claim put forward on behalf of the owners of the *Polurrian* for indemnity for her seizure and detention of the *Polurrian*, holding that the seizure and detention was justifiable, and holding in substance and effect, that whilst in fact he was, while carrying the coal cargo, ignorant of the outbreak of the Greco-Turkish War, the master of the *Polurrian* had used words which might fairly be constructed as meaning that he was aware of the war, and "it could well be considered that both the vessel and her cargo were subject to seizure." On careful consideration of the evidence given by the master of the *Polurrian*, and of the admitted correspondence and admitted documents, I must confess myself with all respect to my brother Pickford unable to concur in the view which, reading his judgment, I understand him to express—viz., that neither the Greek admiral nor the Greek government ever entertained any real doubt as to the right of the owners of the *Polurrian* to have the ship restored to them; that the Greek authorities knew quite well that

they had no grounds for condemning the ship, and meant only to keep her so long as it was convenient for them to keep her to coal their fleet.

In my view, the evidence shows that the Greek admiral attached serious importance to the admission which he understood the master of the *Polurrian* to make when examined by him at Lemnos as to his knowledge of the state of war; and so did the Greek government when he communicated it to them between Oct. 26 and 28, as shown by the communication to our Foreign Office, which appears in the telegram of the latter from our Foreign Office to the plaintiffs. A few days after the capture, and, therefore, soon after the discharge of the cargo at Mudros Bay had begun, the master of the *Polurrian* was informed by the Secretary of the admiral that the question as to the ship would be settled by the government, and that he thought the ship would go to the Piræus—for the purpose, as I understand the words, of having the question of the right to condemn her as a prize settled by a Prize Court. In regard to our own Minister at Athens the inference which I draw from the evidence is that he also treated the question of the release of the *Polurrian* as a real question. On the arrival of the *Polurrian* at the Piræus he calls the attention of the master to his alleged admission to the admiral and tells him that he will have to go into court and give evidence. And indeed it was the British Minister who had from the first insisted that the *Polurrian* ought to come to the Piræus and be dealt with by a Prize Court:

> "Government considers prize, alleging captain having admitted was aware declaration war. British Minister had informed Greek government must come Piræus and matter decided by Prize Court here.":

Henderson's telegram to Salvage Association, Oct. 28, 1912.

The release of the *Polurrian* on Dec. 8 was due, no doubt, mainly, to the fact that the evidence of her master, obtained after the arrival of the *Polurrian* at the Piræus, had then been shown to the Greek government, and that the government, after consulting the Legal Council of State, decided to accept his denial of knowledge of the war, and his denial of having intended in his interview with the Greek admiral to make any admission to the contrary. As to what the master thought at any time as to the prospect of the *Polurrian* being released, either soon or ultimately, I cannot find in the evidence any satisfactory proof, and I venture to think that the learned judge in the court below was under some misapprehension when he stated in the course of his judgment that the master in the evidence which he gave in court said that practically all the officials that he saw expressed their own personal view that they had no right to touch the ship—that is to say, no right to condemn it—and he certainly did not think that the ship was not going to be restored within a reasonable time. At any rate, I have failed to find such a passage in the shorthand notes of his evidence taken at the trial. It is quite true that in a written statement which he gave to the underwriters' solicitors at Athens, made, as he deposed, "for the benefit of the underwriters in the interest of underwriters" and "against the Greeks," there are words which might have that effect.

The fair result of the evidence in regard to the position of the *Polurrian* on Oct. 26, whether viewed apart from subsequent events, as I think it should be, or by the light of those events, was, in my judgment, one in which her ultimate release from capture was a matter of uncertainty. There was, of course, a possibility that she would be released after her cargo had been discharged out of her without her being subjected to adjudication in the Greek Prize Court. There was a good ground for belief that the Greek government would release the vessel, being a neutral vessel, as in fact they did, without waiting for the decision of a Prize Court, if that government could be persuaded that the master of the *Polurrian* was pursuing his voyage in ignorance of the war, and that at all events the Prize Court would be satisfied of this when the evidence of the master was before it. On the other hand, the Greek admiral believed that he had an admission from the master that he did know of the war, and both he and the Greek government did take the view which finds expression in the judgment given by the Greek Prize

Court as appears by their judgment, published Oct. 29, 1913, that, if this knowledge existed, "it could well be considered that both the vessel and the cargo were subject to seizure," or, as Henderson's telegram from Athens of Oct. 28 puts it, and Harris and Dixon's letter to the plaintiffs of the same date puts it, that the *Polurrian* might be considered a lawful prize. Even if the *Polurrian* should be released, either by the Greek government or by the decision of a Prize Court, the date of such release was obviously uncertain—it might be weeks, or months, or longer before the matter would be settled.

Assuming that this was, as it appears to me to have been, the true position of affairs, I am of opinion that, if the present action had come to be decided before the Marine Insurance Act, 1906, had come into force the plaintiffs would have been held to have been entitled to recover upon the policy of insurance as for a constructive total loss. According to the law as it stood before the passing of that Act, the seizure or arrest or detention of a vessel for that which is either avowedly or obviously a temporary purpose, which will end within a period not, from the commercial standpoint, unreasonably long, as in the case cited by ARNOULD ON MARINE INSURANCE (9th Edn.), vol. ii, s. 1108, from EMERIGON, gives no ground of abandonment. But if the taking of the vessel, lawful or unlawful, out of the possession of the owner was, at the date of the commencement of the owner's action to enforce his notice of abandonment, a taking which still continued in operation, and the owner's loss of the use and disposal of the ship, once total, was at that date one which may be permanent and is, at any rate, of uncertain continuance, the owner who had duly given notice of abandonment was held by English law entitled to recover upon his insurance for a constructive total loss. In giving judgment in *Goss* v. *Withers* (2), LORD MANSFIELD, in a passage which is quoted by LORD HALSBURY in *Andersen* v. *Marten* (3) ([1908] A. C. at p. 340) observed (2 Burr at p. 694):

> "The ship is lost by the capture; though she be never condemned at all, nor carried into any port or fleet of the enemy. And the insurer must pay the value."

Again his Lordship said (ibid. at p. 696): "The better opinion of the books says 'sufficit semel extitesse conditionem, ad beneficium assecurati, de amissione navis; etiam quod postea sequeretur recuperatio. Nam per talem recuperationem, non poterit præjudicari assecurato.'"

In *De Mattos* v. *Saunders* (4), WILLES, J., in a passage which is quoted in the judgment of the Privy Council in *Cossman* v. *West* (5) 13 App. Cas. at pp. 179, 180) said (L.R. 7 C.P. at p. 579):

> "The cases cited of hostile seizure and condemnation by a Prize Court have no application. In such a case the original seizure is prima facie a total loss."
>
> "A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and retaken before anyone knows of the loss, and as the contract of insurance is mainly a contract of indemnity, one can see how the courts would struggle against a large profit being made out of such a contract."

(Per LORD HALSBURY, L.C., in *Sailing Ship Blairmore Co.* v. *Macredie* (6) ([1898] A.C. at p. 599.) MARSHALL, in his standard work on the LAW OF MARINE INSURANCE (4th Edn.), p. 403, after adverting to the law of France, which then fixed a period of six months before an arrest of a ship in Europe could be treated by the owner as a total loss, proceeds:

> "In England the rule is more just, for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo, and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, it is equivalent to a total deprivation. It is therefore unreasonable to oblige the insured to wait the event of a capture, detention, or embargo."

But while, if the law to be applied was the law as it stood before the Marine Insurance Act, 1906, came into force, I should, as I have said, have held upon the

facts as I understand them that the plaintiffs were entitled to succeed in this action, we have now to consider the case as the law has been established by the relevant provisions of that Act. It is an Act, as appears by its title, to codify the law relating to marine insurance, but if the court finds that in plain and unambiguous language it has altered pre-existing law, its duty is to decide in accordance with the change. The section which governs the present case is s. 60 (1) and (2). So far as it relates to a constructive loss by capture that section runs thus:

> "(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable. . . . (2) In particular, there is a constructive total loss—(i) Where the assured is deprived of the possession of his ship . . . by a peril insured against, and (a) it is unlikely that he can recover the ship."

One may, I think, without disrespect, declare some regret that the two expressions "reasonably abandoned on account of its actual total loss appearing to be unavoidable" and "unlikely that he can recover the ship" should be used apparently to describe the same position of things. For in my view, at any rate, it is one thing to predicate that a total loss of a thing reasonably appears to be "unavoidable," and another to predicate that its recovery is "unlikely." Taking, however, the latter, and, as it seems to me, the less severe test of the right to treat a capture as constituting a constructive total loss, I think that the statute has modified the pre-existing law to the disadvantage of the assured. One is always properly afraid of incompleteness in attempting a definition, but I venture to say that the test of "unlikelihood of recovery" has now been substituted for "uncertainty of recovery." The assured must now show two things—the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase "unlikely that he can recover" as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know. I have referred to many of the reported capture cases and have been unable to find it used judicially in any of them. But there it stands in the section of the Act of Parliament; its meaning is quite clear.

Therefore, in the present case, to enable the plaintiffs to succeed they must establish fully, (i) that at the date of the commencement of this action they had been deprived of the possession of the *Polurrian*; and (ii) that it was not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so. They have, as my brother PICKFORD has held, and I quite agree with him, made the first point good—the Greek captors did deprive the plaintiffs of the possession of their ship. Have they also shown that there was more likelihood that the plaintiffs would not, than that they would, recover her? The test, in my humble judgment, is one the application of which in this case is, and generally in similar cases of capture would be, very difficult to apply with any sense of satisfaction, because it necessarily involves conjecture and speculation as to what is likely to be the outcome of a number of possible contingencies. Addressing myself, however, to the best of my ability to the question which this s. 60 directs me to consider, my conclusion is that, while I hold that on Oct. 26—the crucial date, because the date of the commencement of the plaintiffs' action—the recovery of the *Polurrian* by her owners was quite uncertain, I do not feel myself justified in holding that the balance of probabilities has been proved so clearly against her recovery that I can say that such recovery was "unlikely." This being so, the plaintiffs must be held to have failed to make out their case, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Botterell & Roche*, for *Vaughan & Roche*, Cardiff; *Parker, Garrett & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

PWLLBACH COLLIERY CO., LTD. *v.* WOODMAN

[House of Lords (Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), February 4, 26, 1915]

[Reported [1915] A.C. 634; 84 L.J.K.B. 874; 113 L.T. 10; 31 T.L.R. 271]

Nuisance—Business—Permission to carry on—Commission of nuisance—Nuisance not necessary to practical conduct of business—Business conducted without negligence and in customary way.

Easement—Implied grant—Need of express grant of right to which implied grant necessarily ancillary—Grant of real property—Implication of easement relating to definite, and not possible use.

By a lease of certain lands and premises dated Sept. 28, 1907, and made between F.G. and the Y. company, the Y. company were authorised to put up works and erections and to carry on the trade of mining. By a sub-lease dated Aug. 8, 1908, the appellants became sub-lessees of the premises on the terms of the lease of Sept. 28, 1907. In 1909 F.G. demised to the respondent adjoining land on which the respondent erected buildings which he used as a slaughterhouse, sausage factory, etc. In 1912 the appellants erected on their land buildings in which they broke, screened, and washed coal, thereby creating dust which the respondent alleged penetrated his buildings and damaged his meat and sausages therein. In an action by the respondent for an injunction restraining the appellants from continuing this course of action the jury found that what the appellants had done amounted to a nuisance, but that they had carried on their operations in a way which was reasonable and customary in the neighbourhood.

Held: (i) permission to carry on a business did not imply permission to carry it on so as to create a nuisance unless (which was not the case here) it could be proved that the business authorised could not in a practical sense be carried on without committing a nuisance; if a nuisance were committed, it could not be excused by proving that the operation causing the nuisance had been carried out without negligence and in the way which was customary in the neighbourhood: (ii) the right to create dust which fell on the respondent's premises could not be justified as being in the nature of an implied easement, for there was no express grant of a right to which the right to create the dust must be necessarily ancillary, and in the case of a grant of real property an easement would only be implied if it were necessary to give effect to the common intention of the parties to the grant with reference to the definite manner and purposes in and for which the land granted was to be used, and not where the subject of the grant was intended to be used in a manner which might or might not involve that manner of use: and therefore, the respondent was entitled to the injunction which he claimed.

Notes. Considered: *A.-G.* v. *Cory*, *Kennard* v. *Cory*, [1921] 1 A.C. 521; *Vanderpant* v. *Mayfair Hotel Co.* (1929), 27 L.G.R. 752. Applied: *Bulstrode* v. *Lambert* [1953] 2 All E.R. 728. Referred to: *Priest* v. *Manchester Corpn.* (1915), 84 L.J.K.B. 1734; *Malzy* v. *Eichholz*, [1916] 2 K.B. 308; *Simpson* v. *Weber*, [1925] All E.R.Rep. 248; *Aldridge* v. *Wright*, [1929] 2 K.B. 117; *Keewatin Power Co., Ltd.* v. *Lake of the Woods Milling Co.*, [1930] A.C. 640; *Liddiard* v. *Waldron*, [1933] 2 K.B. 319.

As to implied easements and nuisances between neighbouring properties, see Halsbury's Laws (3rd Edn.), vol. 12, 538–543, and vol. 28, 131–142 respectively. For cases see 19 Digest 38 et seq. and 36 Digest (Repl.) 281 et seq.

Cases referred to:

(1) *Hall* v. *Lund* (1863), 1 H. & C. 676; 1 New Rep. 287; 32 L.J.Ex. 113; 7 L.T. 692; 9 Jur.N.S. 205; 11 W.R. 271; 158 E.R. 1055; 19 Digest 48, *267.*

(2) *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476; 76 L.J.P.C. 100; 97 L.T. 496; 23 T.L.R. 751, P.C.; 12 Digest (Repl.) 682, *5256.*

(3) *Liford's Case* (1614), 11 Co. Rep. 46b; 77 E.R. 1206; 2 Digest (Repl.) 99, *654.*

(4) *Pomfret* v. *Ricroft* (1669), 1 Wms. Saund. 321; 2 Keb. 543, 569; 1 Sid. 429; 1 Vent. 26, 44; 85 E.R. 454; 19 Digest 80, *482.*

(5) *Senhouse* v. *Christian* (1787), 1 Term Rep. 560; 99 E.R. 1251; 19 Digest 112, *726.*

(6) *Blakesley* v. *Whieldon* (1841), 1 Hare, 176; 11 L.J.Ch. 164; 6 Jur. 54; 66 E.R. 996; 31 Digest (Repl.) 121, *2593.*

(7) *Hinchcliffe* v. *Earl of Kinnoul* (1838), 5 Bing. N.C. 1; 1 Arn. 342; 6 Scott, 650; 8 L.J.C.P. 105; 132 E.R. 1004; 19 Digest 43, *233.*

(8) *Ewart* v. *Cochrane* (1861), 5 L.T. 1; 25 J.P. 612; 7 Jur.N.S. 925; 10 W.R. 3; 4 Macq. 117, H.L.; 19 Digest 44, *247.*

(9) *Royal Mail Steam Packet Co.* v. *George and Branday*, [1900] A.C. 480; 69 L.J.P.C. 107; 82 L.T. 539, P.C.; 19 Digest 88, *526.*

(10) *Jones* v. *Pritchard*, [1908] 1 Ch. 630; 77 L.J.Ch. 405; 98 L.J. 386; 24 T.L.R. 309; 19 Digest 43, *229.*

(11) *Richards* v. *Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest 42, *223.*

(12) *Dalton* v. *Angus* (1881), 6 App. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest 7, *4.*

Appeal by the colliery company, defendants in the action, from an order of the Court of Appeal.

The facts appear in the opinion of LORD ATKINSON.

Sir Robert Finlay, K.C., Cave, K.C., and *D. Villiers Meager* for the appellants.

Micklem, K.C., and *Griffith Jones*, for the respondent, were not called on to argue.

The House took time for consideration.

Feb. 26, 1915. The following opinions were read.

EARL LOREBURN.—In this case Mr. Woodman, a butcher in the county of Glamorgan, sued a neighbouring colliery company in respect of a nuisance caused to him in his trade by their screening and breaking operations. These operations discharged coal dust which was carried by the wind to plaintiff's premises and injured him in his trade. The jury found that this was a nuisance, but that the operations of the company were carried on in a reasonable manner and in the ordinary way in which such operations are usually carried on in the county of Glamorgan. Also they found that the nuisance was not caused by the negligence of the company. At the trial judgment was entered for the defendant company, but the Court of Appeal reversed that judgment, and it now comes before your Lordships.

It is quite clear that if a nuisance has been committed no one can excuse it by simply saying: "I only did what is usually done in this county, and I was not in any way negligent." No doubt the character of the locality may be considered when the question is whether or not there has been any nuisance, but here that question is settled by the jury's verdict. Nor is it material that the company are absolved from negligence. Their duty to their neighbour is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one at all, unless, of course, they have a right to cause one, as, for example, by statute or by consent of the complaining party or of someone whose consent binds

him. Such consent may be proved like any other question of fact. It may appear from the conduct of the parties and the surrounding circumstances, as in the case cited to us of *Hall* v. *Lund* (1), or as in the case of *Lyttelton Times Co. Ltd.* v. *Warners Ltd.* (2), where both parties agreed that the very thing which was done should be done, though neither of them expected that it would cause a nuisance. It is a question of fact, but if in ascertaining the fact it becomes necessary to put a construction upon a document, then it is the function of a court of law to construe the document in the ordinary way. In the argument at your Lordships' Bar this point of consent was the matter really pressed on behalf of the appellant company, and the only point that could be pressed with any regard to the law. Counsel for the company said that they held their colliery by an underlease under a lease of 1907 from the lessor, Mr. Gough, and that by virtue of the lease they had a right to carry on the colliery business in a reasonable and usual manner, even if it caused a nuisance to Mr. Gough or to those who by subsequent demise should derive title from him. They also said that the plaintiff, Mr. Woodman, held the premises (for a nuisance to which the action is brought) under a lease from the same Mr. Gough, dated in 1909, "subject to all rights and easements belonging to any adjoining or neighbouring property," and that, therefore, he could not complain of the nuisance, which had been expressly authorised beforehand by the common lessor from whom he took his lease.

Questions were raised whether or not the right of spreading coal dust over adjoining premises constitutes an easement in law, whether a servient tenement must have certain boundaries, whether Mr. Woodman was bound or not bound by this clause in the lease of 1907. It is unnecessary to enter upon these questions, because, in my opinion, the lease of 1907 does not authorise anyone to commit a nuisance. In that lease the lessees, who were a limited company, are licensed by Mr. Gough "to carry on such industries and trades on the freehold premises hereby demised as the lessees are by their memorandum of association empowered to carry on," and then a number of industries are specified. Among others are those of miners and smelters. That is all. To my mind it is clear that permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If, indeed, it could be proved that the business authorised could not possibly, in a practical sense, be carried on without committing a nuisance, so that everyone must have known the purpose was to commit a nuisance, or if some particular method of carrying it on had been authorised, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different. But no question was asked of the jury raising such a case, nor was any such case raised in the pleadings or argued here, if, indeed, it could have been argued at this stage. Nothing was relied upon beyond the clauses in the lease of 1907, together with the findings of the jury that the appellants' operations were carried on in a reasonable manner as usual in the county, and without negligence. In these circumstances the case stands upon the fact that the company committed a nuisance which they cannot excuse, and the order of the Court of Appeal ought in my view to be affirmed.

LORD ATKINSON.—I concur. The appellants are sub-lessees under a lease dated Aug. 8, 1908, from the Ystalyfera Tinplate Co., Ltd., of certain lands and premises situated at Ystalyfera, in the parish of Llanguick in Glamorgan, held by the latter company under a lease dated Sept. 28, 1907, from one Fleming Gough for a term of ninety-nine years. It is not disputed that, for the purposes of the present case, it may be assumed that the sub-lessees, the appellants, stand in the same position and are clothed with the same rights as to the user of the demised lands as were their lessors. The respondent holds lands adjoining those sub-demised to the appellants, demised to him also by the same Fleming Gough by a lease dated May 3, 1909, and, therefore, subsequent in date to the lease granted to the Ystalyfera company. In 1909 the respondent erected a building on the lands

demised to him, which he used as a slaughterhouse, sausage factory, and place for storing chilled meat, etc. In 1912 the appellants erected on their own lands, within about 130 yards of the respondent's slaughterhouse, certain buildings in which they carried on the business of breaking, screening, and washing coals. The respondent complains that the coal dust created by these operations is carried from these works in large quantities to his slaughterhouse, and penetrates into them, damaging his meat and sausages, so as to be to him a nuisance, and he brings the action out of which this appeal arises for damages, and for an injunction against the continuance of this nuisance. The jury have given the answer already mentioned by the noble and learned Lord.

The lease of Sept. 28, 1907, authorised and empowered the lessees to put up works and erections and to carry on between twenty and thirty different trades, one of which was that of "miners," but the minerals under the demised lands were reserved to the lessor. The appellants contend that, by reason of this provision empowering them to carry on the trade of "mining," a grant to them is to be implied of the right or privilege or easement, if it can be properly so called, to carry on this work in such a way as to cause a nuisance such as is complained of to anyone deriving any part of Fleming Gough's land under an instrument later in date than Sept. 28, 1907; that the premises demised by this instrument stand to the adjoining portions of Fleming Gough's property in the relation of a dominant to a servient tenement; and that the respondent took his premises subject to this right or privilege so impliedly granted to the appellants, even though it caused a nuisance such as that complained of. It was argued on behalf of the appellants that the finding of the jury that the appellants carried on their business in a reasonable and usual manner was sufficient to justify the appellants in causing this nuisance. The finding is, however, far short of a finding that the creation of the nuisance was necessary for the exercise of the aforesaid right or the enjoyment of the privilege or easement claimed to be granted to the lessees. Even assuming that the operation of breaking up, washing, and screening coals is an ordinary operation of mining, and, therefore, covered by the words of the lease, it is quite consistent with the second finding that there may be other methods of doing all these things, reasonably practical in character, which would not cause the nuisance complained of. In this fact lies the fatal defect and insufficiency in the verdict of the jury as a justification of the appellants' action.

I should myself have thought that the law was clear upon this point, but as it was so resolutely contended that it was not necessary for the appellants to establish that the operations causing the nuisance were necessary for the enjoyment by them of the right or privilege they claimed, it is desirable to refer to a few authorities on the point. In *Liford's Case* (3) (11 Co. Rep. at p. 52a) the following maxim is given as expressing the rule of law applicable to grants: "Lex est cuicunque aliquis quid concedit concedere videtur, et id sine quo res ipsa esse non potuit." In PLOWDEN'S COMMENTARIES 16a, the law is laid down in substantially the same words. In *Pomfret* v. *Ricroft* (4) (1 Wms. Saund. at p. 322 (e)) the same maxim is set out as a correct statement of the law. In *Senhouse* v. *Christian* (5) the question was whether under a grant of a free and convenient way over a certain close for carrying coals, among other things, the grantee had a right to lay down a paved waggon-way, and ASHURST and BULLER, JJ., laid it down that it was clear that the grantee had the right to use the way in any manner that was necessary for the purpose of enjoying the privilege so granted. BULLER, J., said (1 Term Rep. at p. 570):

> "It was granted to him [the grantee] that he should have a free and convenient way for the several purposes stated in the deed, amongst others that of carrying coals, and it is found by the jury that he cannot so conveniently carry his coals unless he has a paved waggon-way. Then if such a way be necessary for the purpose of carrying the defendant's coals, he has a right according to the terms of the grant to make it."

SIR JAMES INGRAM, in *Blakesley* v. *Whieldon* (6) founding himself on these two cases, laid down the law thus (1 Hare, at p. 180):

> "The general principle of law, that, where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute."

In *Hinchiffe* v. *Earl of Kinnoul* (7) which was a case concerned with a right of way in which the jury had returned a special verdict, TINDAL, C.J., in delivering the judgment of a court composed of VAUGHAN, BOSANQUET, COLTMAN, JJ., and himself, said (5 Bing.N.C. at p. 24):

> "We are of opinion on the facts found in this special verdict, such right [i.e., the right of way] did pass as a necessary incident to the subject-matter actually demised."

He then cites the passage from PLOWDEN'S COMMENTARIES already referred to, and says:

> "TWISDEN, J., in *Pomfret* v. *Ricroft* (4) lays down the rule of law to be 'when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use. As if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.' "

The special verdict had found that the right of way was not only convenient but necessary for the use of the lessee's premises.

From these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is necessary for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted. Three cases, however, were cited by counsel for the appellants in support of their contention on this point. First, *Hall* v. *Lund* (1). In that case a lessee of a mill carried on for a number of years on the premises demised the trade or business of a bleacher. In the course of this business he discharged into a certain watercourse, the property of his lessor, about seven times each fortnight, water used, and in the using fouled, in his works, thereby polluting the water in the watercourse. The lessee surrendered his lease, and a new lease was made by this same lessor to a lessee described in it as a "bleacher," the premises demised being themselves described as the premises late in the occupation of the former lessee. By the last clause of the new lease it was provided that all buildings erected by the lessee for the purpose of carrying on the bleaching business should at the end of the term belong to the lessor. It was held that there was an implied grant to the lessee of the right to use this watercourse, as the former tenant had used it, for the purpose of carrying on the bleaching business. That case, however, was wholly different from the present. Here the works causing the nuisance were erected and worked during the term. There was no user antecedent to the grant of the lease of any portion of these premises for a business such as the appellants carried on in them. The ground of the decision, as stated by MARTIN, B., shows that the case had no application to the present case. He said (1 H.C. at p. 681):

> "In ascertaining what passes by a conveyance evidence may be given as to the state of the property at the time and the mode in which it was enjoyed."

Again, relying on the authority of *Ewart* v. *Cochrane* (8), he said (ibid. at p. 684):

> "Where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor parted with these rights."

The next case was *Royal Mail Steam Packet Co.* v. *George and Branday* (9). In that case the plaintiffs and defendants were owners of two wharves on the harbour of Kingston in Jamaica, separated the one from the other by a street

called Duke Street. From 1840 till the date of trial the defendants kept coal stores on their wharf, and loaded and unloaded coals thereat. It was common ground between the parties that the defendants had by this user acquired a prescriptive right to continue this practice of loading and unloading coals, though it had constituted an annoyance to the plaintiffs. The action was brought, not for the nuisance caused by the exercise of this prescriptive right, but upon the allegation that the defendants had made alterations in the structure of their works and in the mode of conducting their business, which had produced injurious effects in excess of those which would have been produced by the exercise of the prescriptive right. The judge at the trial left to the jury the question whether the appellants had by this alteration of structure and change of practice caused greater injury to the respondents' works taken as a whole than they had caused before the change. The Judicial Committee held that this was not the question which should have been left to the jury, but the question whether by this extension and alteration of the appellant's works there had been a variation in the kind of servitude imposed on the respondents, substantial enough to cause a new and appreciable wrong; that this was a question of fact which must be found by jury; and that consequently there should be a new trial. The case has not, in my view, any application whatever to the present case.

In the third case, *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2), the appellants and respondents had agreed that the appellants' printing house should be re-built and that the upper part of it should be let to the respondents to be used as bedrooms in connection with their adjoining hotel; that the appellants were to have the ground floor for their own use as an engine-house and for a printing machine for the prosecution of their business. The parties thus expressly contracted that the ground floor of the appellants' house should be used for a specific purpose, which, of course, meant reasonably and properly used for that purpose. There was no evidence that this machinery had been improperly or carelessly worked, but it was an undoubted fact that both parties were under the impression at the time they entered into the agreement that the proper working of the machinery would not cause vibration and noise such as it afterwards did. It was held that no action lay. Here nothing was done but the particular thing which it was contracted and agreed should be done. It was the effect which resulted from the carrying-out of the contract that the parties were mistaken about. In the present case the matter in controversy is the nature and terms of the contract made, not what would follow from the legitimate carrying out of its terms when ascertained. On this point by itself the appellants must, in my view, fail. The appeal should, I think, be dismissed with costs. Having come to this conclusion, it is unnecessary for me to express any opinion on the other point dealt with in the Court of Appeal.

LORD PARKER OF WADDINGTON.—In the present case the jury have found the defendants guilty of nuisance. The nuisance consists in allowing a quantity of coal dust to escape from their works on to and into the plaintiff's shop, to the damage of the sausages and meat which the plaintiff keeps and sells there. There is no question as to the existence of the nuisance itself, but the defendants claim a right to commit it, and the existence or non-existence of this right is the point which your Lordships have to decide.

The defendants claim the right in question under or by virtue of an indenture of lease dated Feb. 28, 1907, and made between Fleming Gough, the plaintiff's predecessor in title, of the one part, and the Ystalyfera Tinplate Co. Ltd., from whom the defendants derive title, of the other part. It is admitted that if the lease in question operated to create the right, such right is now vested in the defendants, and that the plaintiff, who acquired his shop from Fleming Gough after the date of the lease, is bound to submit to its exercise. The only question, therefore, is whether the lease in question operated to create the right. The terms of the lease are sufficiently known to your Lordships, and I will refrain from stating them in detail. There is no express grant of the right alleged; it is said to be

created by implication. The premises demised were partly freehold and partly leasehold, and the lease contained a power for the lessee to put up such buildings, and to carry on such industries and trades on the freehold premises, as the lessees were by their memorandum of association empowered to carry on and be engaged in, these industries and trades being specified in the words of the memorandum and including (inter alia) the business of miners. There is nothing to show that any part of the freehold premises was then used for mining purposes.

The right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim: Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit. Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, nor is there any evidence that the nuisance is necessarily incidental to the defendants' mining operations. The second class of cases on which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used: see *Jones* v. *Pritchard* (10) ([1908] 1 Ch. at p. 636) and *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2). But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use. Thus in *Jones* v. *Pritchard* (10) it was obviously the intention of the parties that the chimney flues connected with the grantor's house should continue to be used by the grantor to get rid of his smoke, notwithstanding that a moiety thereof was conveyed to the grantee, and similarly that the flues connected with the grantee's premises should be used to get rid of the grantee's smoke, notwithstanding that a moiety thereof was retained by the grantor. There was no difficulty, therefore, in implying the appropriate easements. Similarly, in *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.* (2) the lessor was doing on property retained by him precisely what both parties at the time of the grant contemplated that he should do, neither more nor less, and under these circumstances the court implied a reservation of the right to do it, notwithstanding that it occasioned a nuisance to the grantee. *Richards* v. *Rose* (11) is a similar case. In *Hall* v. *Lund* (1) the decision may be explained on the doctrine of continuous and apparent easements, but it is equally explicable on the principle I am now considering. The common intention of the parties in that case may well have been that the bleaching works, the subject of the demise, should be carried on by the lessee in precisely the same manner as had theretofore been the case, the refuse therefrom being turned as theretofore into the natural watercourse which flowed through the lessor's property. I think, however, that WILDE, B., states the principle somewhat too broadly when he says (1 H. & C. at pp. 685, 686):

> "A demise of a brewery would carry with it the right to use the premises for brewing although that might be a nuisance to the lessor or his assigns. So if a mill were demised, the lessee would have a right to grind there, although the noise might annoy the lessor or his assigns."

It is true that a demise of an existing brewery or an existing mill would probably connote a common intention that the brewery or mill should be worked in the

manner in which it had been worked prior to the demise, and, therefore, that if so worked it caused a nuisance to the lessor, he could not be heard to complain. But I doubt whether this would hold if the method of working were subsequently altered and a nuisance thereupon ensued, even though it might be proved that this method of working was the usual method, and that the lessee had been guilty of no negligence.

If, as I think, the principle is as above stated, the real question is whether the use of the screens which occasioned the coal dust was in the contemplation of the parties when the lease was granted. There is no evidence of any circumstance pointing to such an intention. The lessee company was a tinplate company, and even if it had power to carry on the business of coalmining there is no evidence that it ever did so or ever intended to do so. The business of coal mining now carried on on the demised premises appears to have been started by the defendants, and it is only recently that the defendants have commenced to use the screens which occasioned the dust. There appears, therefore, to be no room for any implication based on common intention. In my opinion, therefore, the defendants cannot justify the nuisance in respect of which this action was brought, and the appeal therefore ought to be dismissed with costs.

LORD SUMNER.—In order to succeed in this case the appellants must show that the Ystalyfera lease of 1907 ought to be construed as authorising them to injure the respondent by committing the nuisance which was established by the verdict found at the trial. Like the Court of Appeal, I doubt whether their alleged right is an easement properly so-called. It is highly indefinite. It amounts to a claim to spread their coal dust in injurious quantities anywhere over the lessor's land, in any direction and to any distance, just as the wind, blowing where it listeth, may chance to carry it. The area and the limits of this servient tenement, if such it should be called, are determined only by ownership by the lessor and contiguity to the appellants' premises. For the reason given by LORD BLACKBURN (*Dalton* v. *Angus* (12), 6 App. Cas. at p. 824) in explaining why at common law there is no easement to have an uninterrupted view over another's landscape—namely, that "anything which would impose a burden on a very large and indefinite area should not be allowed to be created except by actual agreement"—I think this right is too indeterminate to be an easement proper.

There is, however, no doubt that by the use of apt and sufficient words such a right may be created by grant. The deposit of coal dust on another's close may be the subject, not of a mere covenant not to prevent it, but of an actual grant of the right to do it. Hence it is not necessary to ask whether such a right would pass under the general words "easements and appurtenances," which, indeed, this lease does not contain; it is enough to ask if the lease expresses or implies it. The appellants contend that it does. The lease does not demise this washing plant as an existing building, for it had not been erected at its date, a point which goes far to distinguish the authorities relied on. Power is given to put up erections for, and to carry on, the trade of miners. This clause is in its nature restrictive; it limits to the company's corporate powers those general lawful uses which a natural person would have inferentially enjoyed. I cannot see how this can be read so as to empower the company to erect and use a coal-mining washing plant, even at the cost of causing a nuisance to the neighbours. There will be no derogation from the lessor's grant, if he, or those claiming under him, successfully resist such an injury, for the appellants will still enjoy the full benefit of reasonable and careful use of the plant, and ample effect will have been given to the words used. There is no finding that they cannot do so without committing a nuisance, nor is a washing plant that will bespatter the countryside with coal dust shown to be an indispensable instrument of coal-mining.

I think the cases cited are all distinguishable. *Hall* v. *Lund* (1) is the case of a lease of a building with the apparent easements or quasi-easements theretofore enjoyed with it, which included a right to foul a stream. But for that prior

enjoyment the right implied would not have extended beyond a reasonable use of the premises themselves. This case is not in point. In *The Lyttelton Times Case* (2) a certain building was erected for the occupation of both parties, and then an agreement was entered into between them by which the one who was the owner of it leased to the other that portion which had been erected for his use. In the course of occupation each was doing the very kind of thing for which the building had been erected. It was held that each must take it as he found it. In the absence of language to the contrary each might, without objection, use in the contemplated way the building erected for the purposes of both. It again does not touch this case. In the same way I think that the principle of *Jones* v. *Pritchard* (10) is the converse of the appellants' claim here. There it was found that the particular use of the premises, which was in question, was actually contemplated between the parties to the instrument in suit when it was entered into—in other words, there was the equivalent of a grant of that use. The only limit in such grant was held to be reasonable care in its use; if, notwithstanding care, the use caused a nuisance to the other party, that was the very thing that was granted. In the present case the question is whether the right to commit a nuisance is granted at all, care or no care. I think it was not; in *Jones* v. *Pritchard* (10) it was, or that was granted which involved it. The case is distinguishable. No other authority was relied on, nor can I see how the appellants' construction can succeed in principle. I think the appeal fails.

LORD PARMOOR [after stating the facts]: The appellants cannot succeed unless they can establish that the term of the lease of Sept. 28, 1907, empowering them, inter alia, to erect buildings and carry on the trade of miners authorises them, as sub-lessees from the Ystalyfera company, to carry on the business of miners so as to cause a nuisance over the adjoining property of the lessor, and that the respondent, in respect of the slaughterhouse and wooden shed, holds, under his demise, subject to this right or easement conferred in the prior lease. It is not contended that the covenant in question directly authorises the original lessees or the appellants to carry on any business so as to cause a nuisance to the adjoining property of the lessor, but it is said that such a right can be, and ought to be, inferred by implication, as being the common intention of the parties, so long as the business is carried on without negligence and in a manner usual in the district.

I confess that I am quite unable to understand this contention unless it can be said that it is practically impossible to carry on the business of mining upon the demised site without causing a nuisance. In the present case there is no evidence that it was in any way necessary, in order to carry on the business of mining, to cause a nuisance, and all the circumstances point to a different conclusion. The nuisance was not complained of until the new plant and machinery came into operation in October, 1912, and up to that date the mining business had been carried on under conditions so that no nuisance was occasioned. The provision relied on in the lease of Sept. 28, 1907, is in truth a covenant of restriction, and not a covenant enlarging the rights of the lessee. Apart from this provision, the appellants might, so far as appears, have carried on any business upon the land in question, subject, no doubt, to the ordinary obligation not to commit a nuisance. The provision, so far as it is effective, restricts the character of the business which may be carried on to those contained in the memorandum of the association of the Ystalyfera company, and it is an extravagant proposition that authority given to a company to carry on any business according to their memorandum of association authorises, by implication, the carrying on of such business so as to cause a nuisance to the occupier of the adjoining property of the lessor, and that this was the common intention of both parties to the lease. I desire to express my concurrence in the judgment of PICKFORD, L.J., when he said in the Court of Appeal (111 L.T. at p. 174):

> "The highest the case can be put in favour of the defendants is that Gough and his tenant, the plaintiff, are under an obligation (using the language of

LORD LOREBURN in the case, to which we were referred, of *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.* (2)) not 'to frustrate the purpose for which, in the contemplation of both parties, the land was hired,' and, therefore, the defendants would have to make out that to restrain the carrying on of the business as a nuisance must frustrate the object for which the land was hired—namely, the carrying on of the business of mining upon it."

In my opinion, it is not material to decide whether an easement has been granted over the land on which the premises occupied by the respondent are situated, since if, on the construction of the lease, a right—other than an easement—has been given to carry on the mining business so as to create a nuisance, the lessor could not by a subsequent lease have derogated from his previous grant, and the appellants would have been entitled to succeed in their appeal. In my opinion, the decision of the Court of Appeal is right, and the appeal should be dismissed with costs.

Order accordingly.

Solicitors: *White and Leonard*, for *William Jones*, Swansea; *J. T. Lewis & Wood*, for *J. Moy Evans*, Swansea.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

PRODUCE BROKERS CO., LTD. *v.* OLYMPIA OIL AND CAKE CO., LTD.

[HOUSE OF LORDS (Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), October 15, 18, November 15, 1915]

[Reported [1916] 1 A.C. 314; 85 L.J.K.B. 160; 114 L.T. 94; 32 T.L.R. 115; 60 Sol. Jo. 74; 21 Com. Cas. 320]

Arbitration—Power of arbitrator—Dispute arising out of contract—Determination whether any usage or custom affecting obligations of parties—Implication as term of contract.

Arbitrators empowered to decide all disputes arising out of a mercantile contract, in determining a dispute referred to them, are competent to decide whether or not there is any trade usage or custom which affects the obligations of the parties under the contract and to give effect to the implication in the contract of the terms of that usage or custom, for they must decide what are the terms of the contract before interpreting and applying it, to which question the existence or non-existence of a usage or custom is relevant.

Hutcheson v. *Eaton* (1) (1884), 13 Q.B.D. 861, and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2), [1908] 2 K.B. 907, disapproved.

Notes. Considered: *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.*, [1926] A.C. 497; *London Export Corpn., Ltd.* v. *Jubilee Coffee Roasting Co.*, [1958] 2 All E.R. 411. Referred to: *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; *Young* v. *Bristol Aeroplane Co.*, [1944] 2 All E.R. 293; *Getreide-Import-Gesellschaft m.b.H.* v. *Contimar S.A. Compania Industrial Comercial Y-Maritima*, [1953] 2 All E.R. 223.

As to the powers of an arbitrator and the conduct of an arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 31, 32, 34–38; and for cases see 2 DIGEST (Repl.) 550–552, 555 et seq., 600–602. For Arbitration Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 89.

Cases referred to:

(1) *Hutcheson* v. *Eaton* (1884), 13 Q.B.D. 861; 51 L.T. 846, C.A.; 2 Digest (Repl.) 601, *1287*.

(2) *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K.B. 907; 78 L.J.K.B. 51; 99 L.T. 680, C.A.; 2 Digest (Repl.) 602, *1288*.

(3) *Meyer* v. *Dresser* (1864), 16 C.B.N.S. 646; 33 L.J.C.P. 289; 10 L.T. 612; 2 Mar.L.C. 27; 143 E.R. 1280, sub nom. *Mayer* v. *Dresser*, 12 W.R. 983; 17 Digest (Repl.) 39, *465*.

(4) *Metzner* v. *Bolton* (1854), 9 Exch. 518; 23 L.J.Ex. 130; 2 W.R. 302; 2 C.L.R. 685; 156 E.R. 221; 17 Digest (Repl.) 51, *590*.

(5) *Tucker* v. *Linger* (1883), 8 App. Cas. 508; 52 L.J.Ch. 941; 49 L.T. 373; 48 J.P. 4; 32 W.R. 40, H.L.; 17 Digest (Repl.) 51, *593*.

(6) *Hutton* v. *Warren* (1836), 1 M. & W. 466; 2 Gale, 71; Tyr. & Gr. 646; 5 L.J. Ex. 234; 150 E.R. 517; 17 Digest (Repl.) 38, *449*.

(7) *Wigglesworth* v. *Dallison* (1779), 1 Doug.K.B. 201; 99 E.R. 132; 17 Digest (Repl.) 38, *448*.

(8) *Humphrey* v. *Dale and Morgan* (1857), 7 E. & B. 266; 26 L.J.Q.B. 137; 28 L.T.O.S. 284; 5 W.R. 466; 3 Jur.N.S. 213; affirmed sub nom. *Dale* v. *Humphrey* (1858), E.B. & E. 1004; 6 W.R. 854; 120 E.R. 783; sub nom. *Humphrey* v. *Dale and Morgan*, 27 L.J.Q.B. 390; 31 L.T.O.S. 328; 5 Jur.N.S. 191, Ex. Ch.; 17 Digest (Repl.) 47, *552*.

Appeal from the decision of the Court of Appeal ([1914] 3 K.B. 1262), affirming a decision of the Divisional Court ([1914] 1 K.B. 442).

By a contract dated May 30, 1912, the appellants, the Produce Brokers Co., Ltd., sold to the respondents, the Olympia Oil and Cake Co., Ltd., 6,000 tons of soya beans, to be shipped from an oriental port in December, 1912, and/or January, 1913, by steamer to Hull. Clause 3 of the contract provided:

> "Particulars of shipment . . . to be declared by original sellers, not later than 40 days from the date of the last bill of lading . . . In case of re-sales copy of original appropriation shall be accepted by buyers and passed on without delay . . ."

Clause 10 provided:

> "This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract. . . ."

The form of contract used was the printed form of contract issued by the Incorporated Oil Seed Association for adoption by persons engaged in the oil seed trade in sales of cargoes of Manchurian soya beans with slight variations adopted by the parties. The contract contained a clause providing that "all disputes arising out of this contract shall be referred to arbitration." By a contract dated Sept. 9, 1912, the Produce company purchased from the East Africa Co. (the shippers of the cargo) under a similar contract 6,000 tons 10 per cent. more or less of soya beans for shipment in December, 1912, and/or January, 1913. On Feb. 4, 1913, the Produce company received a declaration and appropriation of a cargo of 6,400–6,600 tons of soya beans per steamship *Canterbury*, which was stated to have sailed from Vladivostock on Jan. 31, and on the same date the Produce company declared and appropriated this shipment to their contract with the Olympia company. On Feb. 4 the steamship *Canterbury* was wrecked and her cargo totally lost, the loss being known in London about 3 p.m. on that day. The fact of the loss of the ship was not known to the East Africa Co. at the time of their tender to the Produce company, but the latter company were aware of it at the time of their making their tender to the Olympia company. The Olympia company refused to accept the tender, and the question whether the tender was a good tender or not was referred to arbitration under the arbitration clause in the contract. The umpire by his award, dated May 7, 1913, awarded "that the appropriation per *Canterbury* is a good appropriation in the terms of the contract, and must be accepted by the buyers." That was carried to the Committee of

Appeal of the Incorporated Oil Seed Association, and they stated a Special Case for the opinion of the court. Certain questions were asked the court, the material one being whether under the terms of the contract there could be a valid tender or appropriation of a cargo shipped on board the steamship *Canterbury* to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Divisional Court answered these questions in the negative. Thereupon the matter went back to the Committee of Appeal, and on June 25, 1914, they made an award in which they stated that while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade in cases of re-sales that buyers under the form of contract in question impliedly agreed with their sellers that they would accept the original shipper's appropriation if passed on without delay. On a motion by the buyers to have the award set aside, of which notice was given on July 11, 1914, the Divisional Court held that the arbitrators had no jurisdiction to find conclusively the existence of a trade custom, and the Court of Appeal (Buckley, Phillimore and Pickford, L.JJ.), on the authority of *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd., and Hüttenbach & Co.* (2) and, against their own opinion, affirmed this decision. The Produce company appealed.

Sir Robert Finlay, K.C., Leck, K.C., and *F. D. MacKinnon, K.C.*, for the appellants.

Leslie Scott, K.C., and *Dunlop* for the respondents.

The House took time for consideration.

Nov. 15, 1915. The following opinions were read.

EARL LOREBURN.—If in this case we allow the appeal it is to be understood that we are not differing from the opinions expressed by the lords justices. The Court of Appeal felt itself bound by previous decisions of co-ordinate authority though it disapproved of them, while this House is not bound. I agree with the opinions expressed by all the lords justices, and propose to give effect to them by moving that the order appealed from be reversed. It is in one aspect of it a deplorable case. These men of business made contracts and therein agreed to arbitrate upon all disputes arising out of their contracts. Yet there have already been seven distinct stages of argument and decision, four of them in courts of law, upon a dispute arising on those contracts, and the end is not yet. I do not know how many more stages there will be. Parties have a right to prefer what some may consider the imperfect though expeditious wisdom of arbitrators to the slower and more costly justice of His Majesty's courts. It is to be regretted when they have to encounter the inconveniences of both methods with the advantage of neither.

I will not recapitulate the facts of this case or the steps by which it has been brought here. I go direct to the notice of motion of July 11, 1914, by which the Olympia company sought to set aside an award of the Appeal Committee of the Incorporated Oil Seed Association. The appeal before your Lordships springs from this motion. The Olympia company in their notice specified four grounds upon which they relied to set aside the award, the gist of their complaint throughout being that the Arbitral Committee had found and acted upon a custom of trade. I will deal presently with the first ground set out in this notice of motion. The third and fourth grounds, which allege judicial misconduct by the Arbitral Committee, disappear. They were abandoned by counsel for the Olympia company when he perceived how hopeless it must be to sustain them upon the evidence. The arbitrators needed not to hear evidence in regard to customs of a trade in which they were experts when the custom was distinctly raised, both parties had an opportunity of adducing evidence upon it, and neither party chose to do so. If nothing was said about this custom in the Special Case stated for the opinion of the High Court, it was so because the Olympia company who complained of the omission did not ask that the custom should be stated in the Case which they alone

asked for in order to raise points which they alone put forward. Counsel was well advised in abandoning these two grounds. On the remaining ground—namely, the second, the Olympia company partially succeeded, both in the Divisional Court and in the Court of Appeal, to the evident regret of both courts. The point was this. The Olympia company maintained that the Arbitral Committee had no jurisdiction to find that there was a custom of trade binding the parties, and cited two authorities. Certainly these authorities appear to be in their favour, and upon them both courts felt bound so to hold. Accordingly, they adjourned the hearing of the motion and gave both parties liberty to file affidavits as to the existence of the alleged custom. They did so on the footing that there was no jurisdiction finally to find the custom.

In my opinion, the Appeal Committee had jurisdiction finally to find as they did in regard to the custom of trade. I confess that I am no better able than was BUCKLEY, L.J., to understand the contrary principle laid down in *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2). When an arbitrator has power, as here, to decide all disputes arising out of a contract, including questions of law, surely he must decide what the contract is, and he cannot decide that without introducing the custom. These decisions seem to mean that he can decide on the existence of a custom only if he decides rightly. There is no such magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitration tribunal. With all respect, it seems to me that a court plainly usurps the function of an arbitrator when it claims to decide that issue for itself on a submission such as we find here. It is true that a court will decide for itself whether an inferior court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction. I do not see the analogy. Here the jurisdiction of the Appeal Committee to decide the dispute did not depend upon its finding about the custom. There was an agreement of the parties to submit all disputes, and this certainly is a dispute. Therefore, the second ground for the motion in the King's Bench Division fails.

I come back to the first ground, which was that the award was "bad on its face or wrong in point of law." I understand this to mean that on the face of the award there is an incompatibility between the written contract and the custom. It may mean something more, as, for instance, that the custom was unreasonable, for we did not enter upon this part of the case. I was tempted to suggest that, having the case before us, we should dispose of it once for all by deciding this first ground also. But the respondents deprecated that course, and the appellants were lukewarm, if not disinclined, and it is undesirable that this House should, without necessity, act as a court of first instance without the aid of considered judgments in other courts, which are of priceless value to a final Court of Appeal. Therefore, the first ground of the motion still remains to be disposed of by the Divisional Court. Not having heard argument, I express no opinion upon the scope of the first ground, still less upon its merits. I think the best course will be to reverse the order appealed from, to declare that the motion ought to be dismissed as to grounds 2, 3, and 4 contained in the notice, and that the Case be remitted to the Divisional Court to determine it upon the first ground contained in the notice. The reversal is merely a technical reversal, for the judgments were given in accordance with previous decisions, and against the opinion of the judges.

LORD ATKINSON.—Owing to the course the argument in this case has taken, the second only of several questions raised by the notice of motion to set aside the award of the Appeal Committee, upon which the Divisional Court made the order affirmed by the order now appealed from, remains to be decided by this House. That question is whether the Appeal Committee exceeded their jurisdiction in determining that the usage or custom mentioned in the award existed in fact, or in deciding that the respondent company were bound by the alleged usage to accept the appropriation therein referred to. The Divisional Court by their order directed

A that the motion should stand adjourned, both parties to be at liberty to file, within a week, further affidavits on the question of the existence of the custom mentioned in the awards. This order amounts, therefore, in effect, to a decision: (i) that arbitrators or an umpire were incompetent to decide finally the question of the existence of a trade usage or custom affecting obligations under a commercial contract, though the submission entered into by the parties fully empowered them B to decide all disputes arising out of that contract, and (ii) that the Divisional Court had itself jurisdiction to determine that question. The Court of Appeal, feeling itself bound by the authority of *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2), upheld this decision, but at the same time, by a line of reasoning absolutely convincing, in my opinion, showed that those cases were wrongly decided. Primâ facie one would suppose that C authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any judge or arbitrator to determine whether any particular dispute arose out of a contract unless and until he knows what that contract is. This involves that the arbitrator must in such a case construe the contract which the parties entered into, and thus determine what they meant to express by the D language they have used. If, for instance, in a contract relating to any art or trade or business the parties use terms having technical meanings in that art, trade, or business, then those terms should primâ facie have that meaning attributed to them, simply because the parties to the contract presumably used those terms in their technical sense. In such a case, it would appear to me that arbitrators or an umpire would, under such a submission as existed in this case, necessarily have E authority to determine what was the technical meaning of those technical terms. It would, I think, be quite impossible for any court of law not to treat such a determination as one made with full authority, and final in itself.

Now, is there any essential difference between such a case as that and a case where it is sought to construe the language of a contract in relation to, and through the medium of, a trade usage or custom? In my opinion, there is not. The F language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or oral, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that usage, and intended that the usage or custom should form part of it. If they have used language in their contract inconsistent with the custom, that is one of the most effectual ways of negativing this presumption, excluding the cus- G tom, and declaring that their contract is unaffected by it. Erle, C.J., in *Meyer* v. *Dresser* (3) states the law upon this point very neatly thus (16 C.B.N.S. at p. 660):

> "In the cases where local usages are imported into a contract it is because they tacitly form part of it, like those contracts in which we find the words 'other usual terms.' They then form part of the contract itself. The contract H expresses what is peculiar to the bargain between the parties; the usage supplies the rest."

Parke, B., in *Metzner* v. *Bolton* (4) says (9 Exch. at p. 521) that where persons enter into contractual obligations with one another under circumstances governed by a particular usage, then the usage when proved must be considered as part of the agreement. Lord Blackburn, in *Tucker* v. *Linger* (5), speaking of an agri- I cultural usage in reference to a lease of land, expresses himself thus (8 App. Cas. at p. 511):

> "Now, is this custom excluded by the terms of the agreement? The custom, when proved, is to be considered as part of the agreement, and if the agreement be in writing, though the custom is not written, it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, 'We exclude the unwritten customary incident,' of course it is excluded;

and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then, too, the unwritten clause must yield to, and is excluded by, the written one."

This inclusion or exclusion of the so-called "customary clause" is thus necessarily involved in the determination of what is the contract of the parties, and the existence or non-existence of the custom is necessarily involved in determining whether the "customary clause" is to be included or not.

I do not know that it was disputed by counsel on behalf of the respondents that a "customary clause" not expressly or impliedly excluded in the manner pointed out by LORD BLACKBURN would form part of the contract of the parties, or that when included the language of the so-called "customary clause" is to be taken as the language of the contracting parties. He took his stand, rather, on the two decisions of the Court of Appeal already referred to, and contended that the decisions of the arbitrators under such a submission to arbitration as exists in the present case, on the question of the existence of the custom alleged was like, and should be treated in the same way as, the decision of an inferior tribunal, in their own favour, upon some question of fact or law which gave them jurisdiction to decide a case or make an order. I am quite unable to accept that view. It is quite true that under this reference disputes may arise for the decision of the arbitrators, if the "customary clause" be incorporated, which would not arise had it been excluded, and in that sense the field of their judicial investigation might be extended to additional members of the class of matters referred, but that is a wholly different thing. If the contract of the parties were contained in a number of letters, some of which were ambiguously worded, and capable of two or more different constructions, it could not, I think, be contended that the arbitrators would not, under such a reference as the present, be entitled to decide finally that a particular construction of the ambiguous letters was their true construction, though on that construction a greater number of points in dispute might arise for decision than would arise on any other construction. It could not be objected that by deciding as they did they gave themselves jurisdiction over the additional matters of dispute, and that, therefore, their decision on the construction of the letters was not final, but subject to review by the court on a motion to set aside their award. The answer of the arbitrators to such an objection, if made, would naturally and rightly be: "We got full authority to decide all disputes arising out of the contract of the parties, that necessarily involved deciding what the contract was, we have done this by construing their letters; the extra number of disputes arising on the construction we have adopted is immaterial." For my part, I am entirely unable to see upon what ground arbitrators who are expressly or impliedly authorised by the terms of a reference to determine finally what are the terms of a contract into which parties have entered are not authorised to determine finally whether the language, written or verbal, which they have employed constitutes by itself their contract, or, to use the words of ERLE, C.J., whether that language only expresses what is peculiar to their bargain, leaving some trade usage to supply the rest. As a non-existing usage cannot supply anything, it follows that they must have authority to decide finally if the alleged usage exists. I think, therefore, that the two authorities by which the Court of Appeal felt themselves bound in the present case were wrongly decided. Upon that point the reasoning, especially that of BUCKLEY, L.J., is, in my opinion, as I have already said, quite convincing. The appeal should, I, therefore, think, be allowed with costs, and the order of the Court of Appeal should be set aside, the parties to be at liberty to proceed as they may be advised to litigate the other points raised in the motion to set aside the award, other than those mentioned in paras. 3 and 4 of the notice of motion, which have been abandoned during the argument. I approve of the motion suggested by my noble and learned friend LORD LOREBURN on the Woolsack.

LORD PARKER OF WADDINGTON.—I agree that this appeal ought to be allowed. The binding force of an award must depend in every case on the sub-

mission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission. For example, if disputes arise under any particular contract and the parties thereupon agree to refer all disputes arising under that contract, the arbitrator cannot give himself jurisdiction by deciding that any particular dispute arises under the contract in question when it does not, in fact, so arise. This seems reasonably clear when the submission is subsequent to the contract. Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as "all disputes arising under this contract" include questions as to the ambit of the submission itself. Primâ facie I do not think that they would, though it is unnecessary to decide the point.

In the present case the submission covers all disputes arising out of the contract including disputes on questions of law. Questions as to the true meaning and effect of the contract with the possible exception of questions as to the ambit of the submission itself are, therefore, left to the arbitrator. In order to ascertain the meaning and effect of the contract the arbitrator is bound to admit evidence of and consider all relevant facts. The existence or non-existence of any state of circumstances which, if proved, would be relevant on any issue as to the true meaning and effect of the contract, must consequently be within the submission. Clearly mercantile contracts such as the one in question, fall to be interpreted by the light of any custom prevailing in the trade. PARKE, B., in *Hutton* v. *Warren* (6) said:

> "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters in respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

It follows that existence or non-existence of the custom alleged in the present case is relevant to the true meaning and effect of the contract, and is, therefore, within the submission.

The respondents endeavour to displace this conclusion in two ways. First, they contend that the expression "this contract" in the submission means this written document taken apart from all extrinsic facts which might be relevant in determining its true meaning and effect. Such an interpretation of the submission would, in my opinion, defeat the primary object the parties must have had in view. It would be no use to anyone to arbitrate and obtain an award as to what the contract would mean if all relevant extrinsic evidence were excluded. The object of every such clause is to determine the liabilities of the parties having regard to all relevant facts. Secondly, the respondents argued that the effect of the award is to subject them to a liability which does not arise under or by virtue of the contract, but which arises out of the custom either taken alone or in connection with the contract. This again appears to me to be fallacious. The liability of any party to a contract is none the less a liability arising under the contract because the contract itself has to be interpreted with reference to a custom prevailing in the trade. I, therefore, concur in the motion proposed by my noble and learned friend on the Woolsack.

LORD SUMNER.—I agree. The question in this appeal is purely one of construction. Clause 13 says:

> "All disputes from time to time arising out of this contract . . . shall be referred to arbitration, according to the rules endorsed on this contract."

Your Lordships have to decide how much is included in this submission. The words are less precise than they look. In strictness disputes arise not out of a contract but out of conflicting views taken by the parties to the contract. The determination of such disputes may involve the determination not only of the meaning of the language used, but of a variety of subordinate issues of fact, and it is clear that the jurisdiction which the submission confers is, and is intended to, be wide.

The precise dispute, which arose and was referred in this case, is stated in the document of May 9, 1913, in which the arbitrators record their inability to agree and call on their umpire to decide. It is this:

> "A dispute has arisen . . . as to whether the appropriation of about 6,600 tons soya beans per steamship *Canterbury*, under contract dated May 30, 1912, is a good appropriation in the terms of the contract, and as such to be accepted by the buyers."

On the face of it this dispute arises "out of" some contract, which can be no other than that of May 30, 1912. So far the dispute and the whole of the dispute seems to be within the submission. It must be taken on the affidavits that at some stage of the hearings, whether only before the Committee of Appeal or at an earlier stage may not be clear, the sellers affirmed that a custom existed which was applicable to this transaction and conclusive in their favour. The buyers, if they did not actually deny the existence of such a custom, at any rate put it in issue. The matter was validly raised. Admittedly it was the duty of the tribunal to investigate it. The question is whether their decision on the existence of the custom was final or is open to review. The difference is between deciding facts on an issue submitted to the tribunal and investigating facts to see whether they fall within the jurisdiction conferred by the submission. Nobody doubts that arbitrators have a limited jurisdiction, conferred by the submission, which they cannot exceed, and that equally they cannot amplify that jurisdiction by erroneously finding facts, which the submission does not authorise them to decide as arbitrators. Such questions, however, do not arise if on the true construction of the submission it extends to and includes authority to decide, as arbitrators, this incidental issue as to the existence of the custom in question.

The argument for the respondents, which gained point by its brevity, may be put in a nutshell. It was said that this dispute does not arise out of the contract, but out of the contract plus something else—to wit, the custom. One asks what is meant by "the contract" according to this argument? If it is the terms written and printed on the piece of paper and no more, the argument might be good. Whether the words of the contract as a whole are or are not inconsistent with the incorporation of the custom, in either case, the words of the submission would then exclude it. Questions of custom are not referred on this hypothesis, but it is to be supposed that the parties meant to refer part only of their possible disputes when they adopted the trade tribunal. The result is that they chose to refer to trade arbitrators for their final decision the construction and effect of the written contract, although involving questions of law about which they might know nothing, but to reserve to the High Court the ultimate decision of any issue as to the existence of a trade custom, I suppose because the High Court would know little about it, while trade arbitrators might know too much. This seems to me an impossibly narrow construction, none the less that in the latter part of the same sentence the "contract" evidently is the piece of paper—something with a back to it on which rules are indorsed. Besides, the logical result would be that in this case the arbitrators would have no jurisdiction at all, since there is no dispute of which it can be predicated that it arises—that is, wholly arises—only out of the terms written and printed on the piece of paper. The actual dispute is indivisible —the point about the custom is an integral part of it. It could only be decided without raising this point at the cost of real injustice to the sellers. On the other hand, if a dispute, which only in part arises out of the terms written and printed

on the piece of paper, is within the submission, the respondents have no case. Rather inconsistently, as I think, it is admitted that the arbitrators had some authority to inquire into the existence of the custom, and, having informed their minds, had jurisdiction to give effect to it, if it existed—that is, if it existed in the opinion of the High Court or of any tribunal of appeal therefrom, not if it merely existed in their own. This seems to dwell on the limited character of the jurisdiction of arbitrators, while overlooking the real question, which is the definition of the limits as expressed in the submission. If "this contract" in the arbitration clause means the real bargain between the parties, expressed in the written and printed terms, though, where trade customs exist and apply, not entirely so expressed, then the jurisdiction is complete. The custom, if any, was part of the bargain. Whether there is anything in the expressed terms inconsistent with it, and, therefore, controlling or excluding it, is not before your Lordships, nor is any question of its reasonableness. If the bargain is partly expressed in ink and partly implied by the tacit incorporation of trade customs, the first function submitted to the arbitrators is to find out what it is, to read the language, to ascertain the custom, to interpret them both, and to give effect to the whole. If so, the reasoning founded on the analogy of the jurisdiction of county courts fails. The dispute, which arose in fact and raised a question of custom, did not arise out of the contract and something else, it arose out of the contract itself, and involved the contract by raising the custom, and so was within the submission.

It may be that the decisions in *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd., and Hüttenbach* (2) which bound the Court of Appeal, can be supported on other grounds, but in so far as, to employ the language of Brett, M.R., in the former case, they answer in the negative this proposition: "Can a question whether a custom is to be added to the written contract be 'a dispute arising upon this contract'?" I think them erroneous. The proposition is really a petitio principii. Of course the arbitrators cannot add to the contract, but their admitted power to inquire into the existence of the custom provisionally is due to the very fact that in so doing they add nothing to the contract, but are rightly finding out what the contract is before interpreting and applying it. No doubt the expression that customs of trade add terms to written contracts is often used. Lord Mansfield spoke of a custom as neither altering nor contradicting an agreement, but only super-adding a right, as long ago as *Wigglesworth* v. *Dallison* (7). It is more exact to say that the contractual terms, which the custom imports, are already tacitly incorporated as a part, though an unexpressed part, of the agreement between the parties. The maxim is In contractibus tacite insunt ea quæ sunt moris et consuetudinis. Parke, B., in *Hutton* v. *Warren* (6) (1 M. & W. at p. 475), said:

> "Usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent . . . upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

The ground is the same as if the admissibility of evidence of a custom were in question. Lord Campbell in *Humfrey* v. *Dale* (8) said (7 E. & B. at p. 275):

> "The principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex."

On these grounds I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objections to them, and further that in your Lordships' House those objections should prevail. It would have been matter for regret if the construction for which the respondents contend had succeeded.

During the last thirty or forty years most wholesale trades dealing in imported produce have formed trade associations, adopted standard forms of contracts which are invariably used, and created arbitral tribunals formed exclusively of members of the association, which yearly settle thousands of trade disputes to the satisfaction of the trade. Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The system has been devised by mercantile men to suit their needs, and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible. A construction which would have conferred on the Appeal Committee a true arbitral function as to the interpretation and performance of the printed contract, and a provisional and appealable function over so important a matter as the customs of the trade itself, would have been equally anomalous and inconvenient. Further, I think that the transaction in question is pre-eminently one with which the established arbitral tribunal is fitted to deal in its entirety. The transaction, as I understand it, is this. The present sellers had bought back from their buyers an equal quantity of soya beans for the same time of shipment, but at an increased price, and, as they contended, had done so on the understanding that the one contract should be set against the other. If the contracts stood they were losers to the extent of a difference of some £1,850. As the contracts were for the purchase and sale of unascertained goods they provided for the delivery of particulars of the shipments which the sellers elected to appropriate to the contracts. They provided further that "in case of re-sales" (no doubt a most common case) "copy of original appropriation shall be accepted by buyers and passed on without delay." There was also a clause providing that the contract "should be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract." When the present sellers received a declaration from their sellers of the cargo per the *Canterbury*, and before passing it on to their buyers, learnt that the *Canterbury* with her cargo was lost, they conceived that they could pass on the declaration and that their buyers would be bound to accept it, and that, as the portion shipped would never arrive by the *Canterbury*, or at all, the contract would automatically be avoided. The return of the same declaration by the buyers on the second contract, that of re-purchase, which they considered had to be set against the first, would automatically cancel that contract also. Thus, profiting by the ill-fortune of the *Canterbury*, they would escape their loss of £1,850. Of the merits of such a transaction and such an argument, I say nothing, but the matter seems to me to be pre-eminently one to be settled in its entirety by a trade tribunal. If your Lordships had felt constrained to decide that, on the true interpretation of the arbitration clause, the Appeal Committee had power to decide the question of custom only provisionally, while deciding everything else finally, I make no doubt that it would have been imperatively necessary for this and all similar associations forthwith to alter the wording of their form of contract, so as to make its effect correspond to what I am sure was their intention.

LORD PARMOOR.—By a contract in writing of May 30, 1912, the appellants agreed to sell to the respondents about 6,000 tons of soya beans to be shipped from an Oriental port during December, 1912, and/or January, 1913. The contract contained an arbitration clause, that "all disputes arising out of this contract shall be referred to arbitration according to the rules endorsed on this contract." The third clause of the contract provided that "in case of re-sales copy of original appropriation shall be accepted by buyers and passed on without delay." A dispute having arisen whether a good appropriation and tender had been made under the contract, it was referred to the arbitration tribunal. On June 25, 1914, the arbitration Committee of Appeal made their award in favour of the appellants, and found that by the long-established and well-recognised custom of the trade in case of re-sales, buyers under this form of contract impliedly agree with their sellers that they will accept the original shipper's appropriation if passed on without delay.

On July 11, 1914, the respondents gave notice of motion to set aside the award, on three grounds, but only one is material in the present appeal. This ground is that the appeal committee had exceeded their jurisdiction in determining whether the custom mentioned in the award had any existence in fact or in deciding that the respondents were bound by the alleged custom to accept the appropriation therein referred to which was invalid under the terms of the contract. The Divisional Court decided in favour of the respondents, and made an order adjourning the motion to enable the parties to file further evidence on the alleged custom set out in the award, and to be at liberty to give notice requiring the attendance of the deponents before the court for cross-examination. The effect of this order is to withdraw the question whether the alleged custom existed from the arbitration tribunal, and to bring it before the court for determination. This order was confirmed by the Court of Appeal. In giving their judgments the lords justices expressed a strong opinion that had they not been bound by authority they would have come to a different conclusion. I agree in the opinions expressed by the lords justices in the Court of Appeal and in the criticism by BUCKLEY, L.J., of *Hutcheson* v. *Eaton* (1) and *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.* (2). It is unnecessary to refer further to these cases, but I desire to express my concurrence with the dissenting judgment of FRY, L.J., in the earlier case, and can see no answer to his view that an arbitration tribunal cannot decide a dispute arising under a contract without first ascertaining what the contract is, and that to enable the tribunal to ascertain the interpretation of the contract it is competent for it to have regard to all customs, if any, which affect its construction.

In my opinion, the respondents fail to establish the initial step on which their contention is based. They are unable to make good the allegation that there has been any excess of jurisdiction. It is not sufficient to suggest that the arbitration tribunal has gone wrong, having made an error on some matter of fact or law. Under the procedure of the Arbitration Act, 1889, questions of law which arise in the course of an arbitration can be brought before the court either by a consultative Case or by stating the final award in the form of a Special Case [see now Arbitration Act, 1950, s. 21]. In the present instance a consultative Case was brought before the Divisional Court, and the arbitration tribunal states that it has followed the directions which the court gave. The question of jurisdiction depends on different considerations. It is not denied that a dispute did arise under the contract within the meaning of the submission in the arbitration clause. The dispute was whether, under the terms of the contract, the sellers had made an appropriation and tender of the goods sold to the buyers. It is not possible for the arbitration tribunal to determine this dispute, which it is within their jurisdiction to determine, without construing the contract and ascertaining the nature of the bargain between the parties. In the present instance the appellants alleged a mercantile custom which, if reasonable in itself and not contradictory to the written language in the contract, directly affects the construction of the contract. The respondents, however, contended that it is not within the jurisdiction of an arbitration tribunal to determine the existence and effect of a mercantile custom, or at least not to determine it conclusively, although such mercantile custom is included in the contract, and it is impossible to determine the dispute which has been referred, if the inquiry into the existence and effect of such custom is excluded from the consideration of the tribunal. In other words, whenever the existence of a mercantile contract comes in question it is for the decision, not of the arbitrator, but of the courts, and the Divisional Court was right in directing an inquiry before itself by affidavit and cross-examination.

I cannot assent to this proposition. The plea of want of jurisdiction cannot be maintained, unless the determination of the arbitration tribunal as to the existence of the alleged mercantile custom can be said to be an alteration, either by omission or addition, of the contract under which the limit of the jurisdiction of the arbitration tribunal has been agreed between the parties. There is no question that an

arbitration tribunal has no authority to exercise jurisdiction outside the conventional limit agreed in the terms of the submission. It is quite unnecessary to emphasise a point which is beyond controversy. The answer is that a mercantile custom cannot in any way alter the bargain made either by omission or addition, but that it is included in the bargain and affects and regulates the rights and obligations of the parties to the bargain. In the present instance the language used in the written contract is said to have a conventional meaning based on mercantile custom. The meaning and intention of the parties as expressed in the contract cannot be ascertained without first determining whether the language used should be conventionally interpreted in accordance with the implication which the custom would introduce if its existence is proved. It is a matter of the proper interpretation of the language which the parties have used, and that is always a matter of construction. I have stated above that if an error in law is made there are the remedies provided by the Arbitration Act, and the further remedy of direct application to the courts if an award is bad on its face. In order to meet this difficulty counsel for the respondents argued that the words "the contract" in the arbitration clause were limited to so much of the contract between the parties as appeared in the actual written language, although this did not contain the true bargain between the parties or regulate their rights and obligations in reference to the dispute which had arisen. I think that to import such a limitation is inconsistent with the terms of the submission, and that the parties did not agree to refer a dispute, except one which had arisen in reference to the bargain which they had made, and the decision of which would affect their mutual rights and obligations. In my opinion the appeal should be allowed.

Solicitors: *Walton & Co.*; *W. A. Crump & Son*, for *Andrew M. Jackson & Co.*, Hull.

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

Re RYDER. BURTON *v.* KEARSLEY

[Chancery Division (Warrington, J.), March 11, 1914]

[Reported [1914] 1 Ch. 865; 83 L.J.Ch. 653; 110 L.T. 970; 58 Sol. Jo. 556]

Power of Appointment—Power to trustee, tenant for life, to appoint "such part of the corpus of my estate as he shall think fit for his own use and benefit" —Appointment exercised by trustee by deed poll in favour of himself—Validity.

A testatrix who died in 1910 by her will appointed her husband and another person (who disclaimed) her executors and trustees, and directed them to pay one third of the income of the proceeds of the sale and conversion of her residuary estate after the death of her mother (who died in her lifetime) and also the remaining two-thirds to the husband for his absolute use and benefit until he should marry or die. She authorised the husband so long as he shall be entitled to the income "to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit," and subject thereto her residuary estate was to be applied for charitable purposes. The husband died in 1913 without having re-married and having in 1911 by deed appointed the residuary estate of the testatrix to himself for his own benefit.

Held: the will gave the husband a power to appoint the corpus of the whole residuary estate of the testatrix to himself absolutely, and under the combined effect of the will and the deed of appointment he became absolutely entitled to the property at his death.

Re Richards (1), [1902] 1 Ch. 76, applied.

Notes. Considered: *Re Shuker's Estate, Bromley* v. *Reed*, [1937] 3 All E.R. 25. As to life interest with power to resort to capital, see 30 HALSBURY'S LAWS (3rd Edn.) 216, and for cases see 37 DIGEST 395 et seq.

Cases referred to:

(1) *Re Richards, Uglow* v. *Richards*, [1902] 1 Ch. 76; 71 L.J.Ch. 66; 85 L.T. 452; 50 W.R. 90; 46 Sol. Jo. 50; 37 Digest 396, *86*.

(2) *Scott* v. *Josselyn* (1859), 26 Beav. 174; 28 L.J.Ch. 297; 32 L.J.O.S. 250; 5 Jur.N.S. 560; 53 E.R. 863; 37 Digest 395, *80*.

(3) *Pennock* v. *Pennock* (1871), L.R. 13 Eq. 144; 41 L.J.Ch. 141; 25 L.T. 691; 20 W.R. 141; 37 Digest 396, *84*.

(4) *Re Thomson's Estate, Herring* v. *Barrow* (1880), 14 Ch.D. 203; 49 L.J.Ch. 622; 43 L.T. 35; 28 W.R. 802, C.A.; 37 Digest 396, *86*.

(5) *Re Pedrotti's Will* (1859), 27 Beav. 583; 29 L.J.Ch. 92; 1 L.T. 390; 6 Jur.N.S. 187; 54 E.R. 231; 37 Digest 395, *81*.

Adjourned Summons.

Alice Ann Ryder, the wife of Thomas Ryder, by her will made in 1907, after appointing her husband and another person (who disclaimed) to be her executors and trustees, and making a pecuniary bequest to that other executor and a specific bequest to her husband, devised and bequeathed her real and personal estate not thereby otherwise disposed of to her executors and trustees upon trust for sale and conversion, and, after payment of her debts and funeral and testamentary expenses, for investment of the residue of the proceeds of sale and conversion, and to pay one third of the income to her mother (who died in the lifetime of the testatrix) for her life, and after her death to pay the same to the husband of the testatrix for his own absolute use and benefit until he should marry again or die, and upon trust to pay the remaining two thirds of the income of the trust fund to her husband for his own use and benefit until he should marry again or die. Clause 5 of the will was as follows:

> "I authorise my husband so long as he is entitled to the income of part or of the whole of my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit."

Clause 6 provided that "Subject as aforesaid my trustees shall hold my residuary estate and the investments for the time being representing the same" for certain charitable purposes. Then followed clauses empowering the trustees to postpone the sale and conversion of her estate and naming the authorised investments. The testatrix died in 1910. Her husband did not marry again. By a deed poll made in 1911 the husband in exercise of the power given him by the will and every other power enabling him appointed the net moneys to arise from the sale of the real and personal estate of the testatrix, and all other the moneys or investments constituting the corpus of her residuary estate, subject to the powers and trusts over such estate vested in him as executor and trustee of the will, unto himself for his own absolute use and benefit. The husband died in 1913 having by his will appointed the plaintiff and William Kearsley the executors of his will, and bequeathed the residue of his estate to William Kearsley. The other executor by this summons asked the court whether under the will of Mrs. Ryder and the deed poll of Feb. 28, 1911, Thomas Ryder was entitled to the real and residuary personal estate of his wife absolutely or for life only.

A. L. Ingpen for the trustee.

Clauson, K.C., and *R. H. Hodge* for the defendant Kearsley.

WARRINGTON, J.—The question in this case is whether certain property once part of the estate of the testatrix, Alice Ann Ryder, is to be treated as still part of her estate, or as part of the estate of her husband, Thomas Ryder: and that question depends entirely upon the true construction of the will of the testatrix. [His Lordship stated the facts, and continued:] The defendant Kearsley contends that so much of the estate as was vested in the husband at the date of his death was the absolute property of the husband, and passed under his will. The Attorney-General contends that so far as the wife's estate can be traced, and has not been completely applied by the husband, it is now subject to the charitable purposes declared by the will. The question depends upon the construction of the fifth paragraph of the will, whether or not it confers on the husband a general power of appointment. I do not think that it gave him any power to appoint by his will, but, in my opinion, it did give him power to appoint such portion of the estate as he should think fit for his own use and benefit during his lifetime. Suppose that he had desired to appoint a portion for the benefit of some third person, that would have been one mode of applying it within the meaning of the will. If he could do that, I see no reason why he should not appoint it in favour of himself. In my opinion para. 5 gives him absolute power inter vivos to do with the corpus whatever he thinks is for his own use and benefit. If he considered that the best thing to do was put the property in his own possession, he was to be entitled to do so. The execution of a deed poll is only machinery by which he applies the property for his own benefit.

So far I have stated the question apart from authority. With respect to the authorities, I have been referred to *Scott* v. *Josselyn* (2), *Pennock* v. *Pennock* (3), and *Re Thomson's Estate* (4). These are all cases very much like the present one, but in each of them there was no express decision on the point. The question in those cases arose after the death of the person in the position of the husband in the present case; and after the death of that person, without having exercised the suggested power of appointment. But in each of those cases, without exception, the contest was between those who contended that the tenant for life only had a power of appointment and those who contended that he was absolute owner of the property, and in each case the court decided that he was not absolute owner, but that the property passed under the gift over. But in each case, with one exception, the court expressed an opinion that the tenant for life had power to appoint the property inter vivos. The only exception is that James, L.J.—though it was not necessary to the decision—said in *Re Thomson's Estate* (4) that the strong inclination of his opinion was that the tenant for life took, not a power of appointment, but only an estate for life

> "with full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie."

That, however, was nothing more than a dictum, and, moreover, the words in the will then before the court differed materially from those of the present will. But there is another case, *Re Richards* (1) decided by Farwell, J., which seems to me directly in point. In that case the question arose in the lifetime of the tenant for life, who took out the summons to have it determined what interest she took in the capital of the estate. The testator had given her the income for her life, and directed that, if such income should not be sufficient, she was to use such portion of his real and personal estate as she might deem expedient—in substance a provision the same as that in the will before me. I can see no distinction between them. The only question was as to the meaning of "such portion . . . as she might deem expedient." It was contended, on the authority of *Re Pedrotti's Will* (5), that the tenant for life could only resort to the capital if the income was in fact insufficient. But Farwell, J., said that in his opinion the tenant for life was to be the judge whether the income was sufficient or not, and that therefore, though the gift was in form conditional, there was no real condition at all, and

A he decided that the lady had a general power of appointment inter vivos. I come to the same conclusion here, and I hold that the husband was absolutely entitled to the property at his death.

Solicitors: *Johnson, Weatherall & Sturt*; Treasury Solicitor.

[*Reported by* N. TEBBUTT, ESQ., *Barrister-at-Law*]

B

C

A. G. SPALDING BROTHERS *v.* A. W. GAMAGE, LTD.

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), February 5, 9 and March 23, 1915]

D

[Reported 84 L.J.Ch. 449; 113 L.T. 198; 31 T.L.R. 328.]

Passing-Off—Misdescription of another trader's goods—Inferior goods of other trader represented to be superior goods of that trader.

No person has a right to sell, or offer for sale, goods of another trader of an inferior or different class or quality under conditions calculated to represent E such goods as goods of that trader of a superior and distinctive class. If this is done, an actionable wrong is committed, irrespective of motive or fraud. A plaintiff who establishes a case of this character is entitled to an injunction, and, if necessary, to an inquiry into damages.

Notes. Considered: *Draper* v. *Trist*, [1939] 3 All E.R. 513; *Jaques* (*John*) *& Son, Ltd.* v. *Chess*, [1939] 3 All E.R. 227; *Bollinger* (*J.*) v. *Costa Brava Wine Co.*, F [1959] 3 All E.R. 800. Referred: *Illustrated Newspapers, Ltd.* v. *Publicity Services* (*London*), *Ltd.*, [1938] 1 All E.R. 321; *Saville Perfumery, Ltd.* v. *June Perfect, Ltd. and Woolworth & Co. Ltd.* (1941), 58 R.P.C. 147; *Gor-Ray, Ltd.* v. *Gilray Skirts, Ltd. and Garment Industries, Ltd.* (1952), 69 R.P.C. 99; *Electrolux, Ltd.* v. *Electrix, Ltd.* (1953), 71 R.P.C. 23; *Reuter* (*R. J.*) *Co.* v. *Mulhens* (*Ferd*), [1953] 2 All E.R. 1160; *Harker Stagg Ltd.'s Trade Mark* (1954), 71 R.P.C. G 136; *Wilts United Dairies, Ltd.* v. *Thomas Robinson Sons & Co.*, [1958] R.P.C. 94; *Brestian* v. *Try*, [1958] R.P.C. 161; *Sim* v. *H. J. Heinz Co., Ltd.*, [1959] 1 All E.R. 547.

As to passing off, see 32 HALSBURY'S LAWS (2nd Edn.) 614 et seq.; and for cases see 43 DIGEST 264 et seq.

H Cases referred to:

(1) *Burgess* v. *Burgess* (1853), 3 De G.M. & G. 896; 22 L.J.Ch. 675; 21 L.T.O.S. 53; 17 Jur. 292; 43 E.R. 351, L.JJ.; 43 Digest 286, *1155*.

(2) *Reddaway* v. *Banham*, [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218, H.L.; 43 Digest 277, *1098*.

(3) *Edelsten* v. *Edelsten* (1863), 1 De G.J. & Sm. 185; 7 L.T. 768; 9 Jur.N.S. I 479; 11 W.R. 328; 46 E.R. 72, L.C.; 43 Digest 217, *614*.

(4) *Iron-Ox Remedy Co., Ltd.* v. *Co-operative Wholesale Society, Ltd.* (1907), 24 R.P.C. 425; 43 Digest 300, *1248*.

(5) *Blofeld* v. *Payne* (1833), 4 B. & Ad. 410; 1 Nev. & M.K.B. 353; 2 L.J.K.B. 68; 110 E.R. 509; 43 Digest 334, *1555*.

(6) *Burberry's* v. *Cording & Co. Ltd.* (1909), 100 L.T. 985; 25 T.L.R. 576; 26 R.P.C. 693; 43 Digest 304, *1280*.

(7) *Payton & Co.* v. *Snelling, Lampard & Co.*, [1901] A.C. 308; 70 L.J.Ch. 644; 85 L.T. 287; 17 R.P.C. 628; H.L.; 43 Digest 308, *1310*.

Appeal by the plaintiffs in the action from an order of the Court of Appeal (Lord Cozens-Hardy, M.R., Buckley and Phillimore, L.JJ.) reversing a judgment of Sargant, J., in favour of the plaintiffs. A

For about three years previous to 1910 the plaintiffs advertised and sold a novel kind of football under the name of the "Orb" or "Improved Orb" football, the outer cover of which was moulded instead of sewn. In 1910, defects having been found in the making of the balls, the plaintiffs discarded a large number of them as unsatisfactory, and sold them as waste rubber to a firm who re-sold them to the defendants. In 1912 the plaintiffs brought out a new ball, which they advertised as the "Improved Sewn Orb," "Improved Orb," or "Specially Tested Orb," "patent 15,168," at 10s. 6d. each. In August, 1912, the defendants advertised the old "Orb" balls for sale at 4s. 9d. each, under the description of "Improved Orb" footballs. "Patent No. 15,168." On Aug. 29 the plaintiffs pointed out to the defendants that the advertisements were not justified, and on the next day they issued the writ in the present action. On the following day they received a letter from the defendants, who said that they did not wish to describe their footballs under the description complained of, that the advertisement was due to a stupid mistake, and that they had taken steps to stop the advertisement, and they offered an apology. Notwithstanding this letter the plaintiffs proceeded with the action. B C D

By the statement of claim the plaintiffs claimed an injunction to restrain the defendants from selling or advertising footballs other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs as and for the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs, and an inquiry as to damages and costs. By their defence the defendants relied on the letter already referred to, and said that they had stopped all advertisements such as were complained of as soon as their attention was called to the mistake, and had posted notices in their shops, saying that they did not stock the "Improved Orb" but only sold the original pattern of "Orb." The defendants subsequently issued advertisements which were held at the trial to be innocuous in themselves, but which contained no reference to the mistake which had been made in the earlier advertisements. On an application for an interim injunction, the defendants undertook not to sell, advertise, or offer for sale, or supply footballs other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" footballs as or for the plaintiffs' balls of those descriptions, and they offered a perpetual undertaking not to sell any balls other than the plaintiffs' "Improved Orb" or "Specially Tested Orb" football under those descriptions. The plaintiffs, however, proceeded to trial. Sargant, J., granted an injunction and inquiry as to damages. The Court of Appeal, however, were of opinion that the plaintiffs were not entitled to an injunction or to an inquiry as to damages. An action of this sort was analogous to a quia timet action, and even where passing off was threatened the plaintiff could only recover nominal damages. If actual passing off was proved, substantial damages no doubt might be recovered. But here, after the issue of the writ, there was no threat or claim of right to repeat the advertisements complained of, and there was nothing upon which to found an inquiry as to damages. Accordingly the appeal was allowed and the action dismissed. The plaintiffs appealed. E F G H

Sir Robert Finlay, K.C., Martelli, K.C., and *A. F. Topham*, for the appellants.
A. J. Walter, K.C., and *Kerly, K.C.*, for the respondents. I

The House took time for consideration.
Mar. 23, 1915. The following opinions were read.

LORD DUNEDIN.—At the request of my noble and learned friend Lord Parker of Waddington, I am about to read his judgment, and I have to state that the **LORD CHANCELLOR** agrees with it.

LORD PARKER OF WADDINGTON.—The action in which this appeal arises is what is known as a passing-off action, and having regard to the arguments

which have been addressed to your Lordships, I think it well to say a few words as to the principle on which such actions are founded. This principle is stated by Turner, L.J., in *Burgess* v. *Burgess* (1) (3 De G.M. & G. at pp. 904, 905), and by Lord Halsbury in *Reddaway* v. *Banham* (2), ([1896] A.C. at p. 204), in the proposition that nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else. I prefer the former statement, for whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing off of the defendant's goods for the plaintiff's need not be proved as a condition precedent to relief in equity either by way of an injunction or an inquiry as to profits or damages: *Edelsten* v. *Edelsten* (3) and *Iron-Ox Remedy Co., Ltd.* v. *Co-operative Wholesale Society, Ltd.* (4). Nor need the representation be fraudulently made. It is enough that it has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts. The representation is in fact treated as the invasion of a right giving rise at any rate to nominal damages, the inquiry being granted at the plaintiff's risk if he might probably have suffered more than nominal damages. The view taken by the common law courts was somewhat different. The plaintiff's remedy is said to have been in the nature of an action for deceit, but it only resembled the action for deceit in the fact that the misrepresentation relied on must have been fraudulently made. In all other respects it differed from an action for deceit. For example, the plaintiff was not the party deceived, and even if it were necessary to prove that someone had been deceived, nominal damage could be obtained though no actual damage was proved. Thus in *Blofeld* v. *Payne* (5) the defendants had sold their own hones in the plaintiff's wrappers as and for the plaintiff's, but there was no evidence that any purchasers had been actually deceived. Further, though special damage was alleged in the declaration, no actual damage was proved. On motion for a non-suit it was held in the King's Bench that the plaintiff was entitled to nominal damages. The action was, in fact, treated as one founded on the invasion of a right.

The proposition that no one has a right to represent his goods as the goods of somebody else must, I think, as has been assumed in this case, involve as a corollary the further proposition that no one who has in his hands the goods of another of a particular class or quality has a right to represent these goods to be the goods of that other of a different quality or belonging to a different class. Possibly, therefore, the principle ought to be restated as follows: "A. cannot, without infringing the rights of B., represent goods which are not B.'s goods or B.'s goods of a particular class or quality to be B.'s goods or B.'s goods of that particular class or quality." The wrong for which the relief is sought in a passing-off action consists in every case of a representation of this nature. The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question, property in what? Some authorities say property in the mark, name, or get-up improperly used by the defendant. Others say property in the business or goodwill likely to be injured by the misrepresentation. LORD HERSCHELL, in *Reddaway* v. *Banham* (2) expressly dissents from the former view, and if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view. In the first place, cases of misrepresentation by the use of a mark, name, or get-up do not exhaust all possible cases of misrepresentation. If A. says falsely, "These goods I am selling are B.'s goods," there is no mark, name, or get-up infringed unless it be B.'s name, and if he falsely says, "These are B.'s goods of a particular quality," where the goods are in fact B.'s goods, there is no name that is infringed at all. Further, it is extremely difficult to see how a man can be said to have property in descriptive words, such as "camel hair" in the case of *Reddaway* v. *Banham* (2) where every trader is entitled to use the words, provided he only uses them in such a way as not to be calculated to deceive. Even in the case of what are sometimes referred to as common law trade marks the property, if any, of the so-called owner is in its nature transitory, and only exists so long as the mark is distinctive of his own goods in the eyes of the public or a class of the public. Indeed, the necessity of proving this distinctiveness in each case as a step in the proof of the false representation relied on was one of the evils sought to be remedied by the Trade Marks Registration Act, 1875, repealed by Patents, Designs and Trade Marks Act, 1883, which confers a real right of property on the owner of a registered mark. I had to consider the matter in the case of *Burberrys* v. *Cording & Co., Ltd.* (6) and I came to the same conclusion.

The facts of this case may be stated as follows: The appellants are dealers in footballs, and supply both the trade and the public. They have for some years described their footballs as "Orb" footballs, and there can be no doubt that the word "Orb" is distinctive of their goods of this description. In 1910 they catalogued and were selling three varieties—the "Special Bramble Pattern Orb," the "Improved 1910 Orb," and the "Improved 1910 Rugby Orb." In 1911 they were cataloguing and selling also three varieties—the "Special Bramble Pattern Orb," the "Improved Orb," and the "Improved Rugby Orb." All these balls are referred to as "improved and strengthened balls" placed on the market in this year. All the 1910 and 1911 varieties were moulded, as opposed to sewn footballs. For the year 1912 they catalogued an "Improved Sewn Orb" football, stating that this ball was a "great improvement on the old moulded ball," but not otherwise referring to moulded balls. The facts were that in 1910 complaints had been made of the moulded balls, and towards the end of that year the appellants, in consequence, ceased to manufacture them, and began to manufacture the ball subsequently catalogued as the "Improved Sewn Orb." They also withdrew from sale such part of their stock of moulded balls as they thought to be unsatisfactory. The moulded balls so withdrawn appear to have consisted partly of the 1910 and partly of the 1911 ball. The moulded balls catalogued and sold in 1911 consisted of that part of the stock which they thought was free from the defects complained of. In 1912 they determined to put their "Improved Sewn Orb" on the market instead of moulded balls, and in April or May, 1912, they sold the balls they considered defective to Mellis, Schein & Co., who are waste rubber merchants, one lot being sold as old moulded balls and the other as new moulded balls. Unfortunately, they did nothing to prevent these balls being put on the market as "Orb" footballs, and Messrs. Mellis, Schein and Co. appear to have sold them to the respondents. Mr. Parker, the respondents' manager, instructed Mr. Webber to advertise these balls for the firm's August sales. Mr. Webber cut out of the appellant's 1912 catalogue the description there contained

of the plaintiff's "Improved Sewn Orb," and gave it to Mr. Glasspole to work upon as the basis of an advertisement for the balls in question, and Mr. Glasspole, working on this basis, produced the advertisements. The question your Lordships have to decide is whether these advertisments in fact represent that the balls purchased by the respondents from the waste rubber manufacturers were the same balls as those referred to in the appellants' 1912 catalogue and being sold by the appellants as the "Improved Sewn Orbs." In order to arrive at a conclusion on this point it is necessary to compare these advertisements with the appellants' 1912 catalogue. In that catalogue they refer to the "Improved Sewn Orb" as made under the patent No. 15,168—the real number should be 15,163, but this is not very material. The ball is referred to as "a great improvement on the old moulded ball," which means, of course, any moulded ball theretofore sold by them. It is also stated to be "undoubtedly the best ball on the market for schools and junior clubs." The catalogue contains a picture of the ball stamped not only with the word "Orb," but with the words "specially tested," and the ball is said after repeated tests to have been passed by certain clubs. The price is stated to be 10s. 6d. Turning now to the respondents' advertisements, the first is an advertisement of the "Improved Orb" football, and this ball is stated to have been made under the patent No. 15,168, a statement which was entirely untrue. It is stated to be the best on the market for schools and junior clubs. It is stated to have been passed by all the clubs referred to in the appellants' catalogue, and the advertisement contains precisely the same picture as appeared in the appellants' 1912 catalogue, with the same stamp. The defendants' price is stated to be 4s. 9d., in contrast with the "usual price" of 10s. 6d. The second advertisement is of the "Celebrated Orb" football, stated to be "specially tested." It is stated to be a "serviceable ball" for schools and junior clubs, and to have been passed by all the clubs referred to in the plaintiffs' catalogue. Its price is stated as 4s. 9d., as opposed to the usual price of 10s. 6d. The advertisement contains precisely the same picture as appeared in the appellants' 1912 catalogue with the same stamp. In the third advertisement there appear in large letters the words "10s. 6d. football for 4s. 9d. Gamage's Bargain," and in smaller letters, "We have secured the whole stock of the Orb footballs illustrated here, and in accordance with our rule we offer our customers the benefit of this fortunate purchase, thus enabling you to get a 10s. 6d. football for 4s. 9d.—a bargain indeed." Again the illustration is that which appears in the appellants' 1912 catalogue, and is similarly stamped. The advertisement then refers to the ball advertised for sale as "the Improved Orb football, Patent No. 15,168," stating that it "is a great improvement on the old moulded ball," and proceeds, "after repeated tests this ball has been passed by the Football Association and the Amateur Football Association," being two of the clubs referred to in the appellants' 1912 catalogue.

It appears to me to be quite certain that anyone comparing any of these advertisements with the catalogue, or anyone with a knowledge of the catalogue and seeing the advertisements, would be led to conclude that the respondents were offering for sale at 4s. 9d. the identical ball catalogued by the appellants in their 1912 catalogue at 10s. 6d. Indeed, I find it difficult to imagine that the advertisements were not deliberately framed so as to convey this impression. The respondents' counsel sought to justify the advertisements on the ground that the statements therein contained were only a repetition of what the appellants had themselves said in former catalogues of the moulded ball described as the "Improved 1910 Orb," or the "Improved Orb," but this, unfortunately, is not so. No ball had been theretofore catalogued by the plaintiffs as made under patent No. 15,168. No ball had in any preceding catalogue of the plaintiffs been illustrated as stamped with the words "Specially tested." Even when we come to the words "better than the old moulded ball," I can find no justification for their use in the advertisements. The appellants in their catalogue were contrasting the new sewn variety with the old moulded variety theretofore sold by them.

Even if the respondents say that they intended to contrast one moulded ball with another their statement would be untrue, for the balls they were selling were old moulded balls of the 1910 and 1911 varieties. But, after all, the question whether any particular statement was true or otherwise is not a pertinent question; the really pertinent question is whether the advertisements as a whole were calculated to deceive, and it seems to me that they were so calculated.

It was also contended that the question whether the advertisements were calculated to deceive was not one which your Lordships could yourselves determine by considering the purport of the advertisements themselves, having regard to the surrounding circumstances, but was one which your Lordships were bound to determine upon evidence directed to the question itself. I do not take this view of the law. There may, of course, be cases of so doubtful a nature that a judge cannot properly come to a conclusion without evidence directed to the point, but there can be no doubt that in a passing-off action the question whether the matter complained of is calculated to deceive, in other words, whether it amounts to a misrepresentation, is a matter for the judge, who, looking at the documents and evidence before him, comes to his own conclusion, and, to use the words of LORD MACNAGHTEN in *Payton & Co.* v. *Snelling, Lampard & Co.* (7) ([1901] A.C. at p. 311), "must not surrender his own independent judgment to any witness whatever."

If, however, any evidence is required, your Lordships have in this case the evidence of Mr. Ritson, who was actually misled by the advertisement in question into thinking that the balls advertised were the "Improved Sewn Orbs" mentioned in the appellants' 1912 catalogue. Mr. Ritson was a retail dealer, and had already stocked some of the appellants' 1912 balls, and was in possession of this catalogue. Seeing one of the respondents' advertisements, he thought they were selling the same ball for 4s. 9d., and as he had given the appellants their wholesale price of 8s. 4d. for the balls stocked by him, and, therefore, could not afford to sell below this price, he was naturally alarmed, and wrote a letter of complaint to them.

In my opinion, therefore, the misrepresentation on which the appellants rely may be taken as fully established. Further, the misrepresentation so established was, in my opinion, of such a nature as to give rise to a strong probability of actual damage to the appellants in both their retail and wholesale trade. I refrain, however, from amplifying this point so as not to prejudice any question which may arise on any inquiry as to damages which your Lordships may direct. It is sufficient to say that the misrepresentation being established, and being in its nature calculated to produce damage, the appellants are primâ facie entitled both to an injunction and to an inquiry as to damage, the inquiry, of course, being at their own risk in respect of costs. The respondents, however, seek to displace this primâ facie right to relief on the part of the plaintiffs under the following circumstances. Immediately after the appellants' attention was called to the advertisements in question, Mr. Cox, their manager, had an interview with Mr. Parker. Mr. Parker treated the matter somewhat lightly, and did not offer any undertaking or make any proposal which Mr. Cox could reasonably accept. This occurred on Aug. 29, 1912, and on Aug. 30 the appellants issued their writ in this action. The appellants at the issue of the writ, and, indeed, subsequently, at any rate till after the close of the pleadings, were not aware that the balls advertised by the respondents, were the balls which they had sold to the waste rubber merchants. This is, in my opinion, only material with regard to the frame of the writ and the statement of claim, and cannot affect the appellants' right to relief. On Aug. 31 Mr. Parker, having apparently consulted his solicitors, wrote to the appellants the letter of that date, which in effect contains a promise not to advertise the respondents' balls as made under patent No. 15,168 or as "specially tested." Inasmuch as the gist of the appellants' complaint was not any particular statement in the advertisements, but a misrepresentation suggested by the advertisements as a whole, this offer seems to me totally in-

adequate, and the appellants, in my opinion, were justified in continuing the action. Upon an interlocutory motion the respondents gave an undertaking which might have been adequate, but it was only given until the trial. In their defence they state that they undertake perpetually in the words of the undertaking given on the interlocutory motion, but they do not offer this undertaking to the court, nor do they offer to submit to an inquiry as to damages or to pay the costs. In my opinion, therefore, nothing that took place after Aug. 29, 1912, can operate to displace the appellants' primâ facie right to relief.

Some discussion took place before your Lordships as to the subsequent advertisements issued by the respondents, it being admitted that these advertisements were not such that, taken alone, would have given rise to a right of action on the part of the appellants. This may well be so, but taken in connection with the previous advertisements, I cannot help thinking that SARGANT, J., was right in his conclusion that they were hardly consistent with fair or honest trade. The effect of a misleading advertisement is a continuing effect, and it might reasonably be expected that a fair and honest trader, having his attention called to the fact that his advertisements were misleading, would do all in his power to counteract their effect. There is nothing in the subsequent advertisements pointing to a desire on the part of the respondents to undo the harm they had done by their first advertisements. Indeed, I am not sure that the subsequent advertisements are not so framed as to strengthen a belief induced by the first that the respondents were selling for 4s. 9d., or some less price, the same ball as the appellants had catalogued at 10s. 6d., whereas, under the circumstances, they ought in common fairness to have been so framed as to counteract such belief.

My conclusion, therefore, is that the appeal ought to be allowed and the judgment of SARGANT, J., restored.

LORD ATKINSON.—I have had the pleasure and advantage of reading the opinion that has just been delivered. I concur in it entirely and have nothing to add.

LORD SUMNER.—I concur. I am in entire agreement with the statement of the law just made by my noble and learned friend, LORD PARKER OF WADDINGTON and I should not trouble your Lordships with any observations except out of respect for the Court of Appeal and in order to explain why I venture to differ from their conclusion.

The Court of Appeal seem to have thought that there was little resemblance between the respondents' first advertisements and the appellants' catalogue. They attached capital importance to the word "sewn," which was absent in the one and present in the other, and, as I gather, little or none to the identical picture of the football. All comparisons of pictures or designs must be matters of individual opinion, in which argument helps but little, and each must judge for himself. I differ from them, as do your Lordships, in thinking that the advertisement, to which this picture gives point, is calculated, and in no small degree through the picture itself, to confuse in the public mind that which the respondents had to sell with that which the appellants advertised in their catalogue of 1912 in association with that picture. Further, on Aug. 30 the witness Ritson, whose evidence was accepted by SARGANT, J., and indeed was not contradicted, already knew the respondents' advertisement, the appellants' catalogue containing the picture and description of their 1912 football, and the ball itself, of which he had bought one or more specimens. I think the fair effect of his evidence is that he regarded the advertisement as putting forward such distinguishing characteristics of the appellants' 1912 ball and the appellants' specific description of it as led him, a person in the trade, to take the ball offered by the respondents to be the appellants' 1912 ball. If he did not specifically say what he considered those distinguishing characteristics to be, it was only because he was not particularly questioned about it.

From this initial difference of opinion most, if not all, the other differences follow. The writ, instead of being blameworthy as hastily directed to an erroneous supposition of the facts, appears to have been necessary in order to vindicate the appellants' rights. The difference of time, albeit only some twenty-four hours, between the issue of the writ and the receipt of Messrs. Gamage's letter of regret, gives the appellants an advantage of which they should not be deprived. When it was issued they had no assurance at all that the respondents would not continue the course of action to which they had rightly objected, and the interview with Messrs. Gamage's manager on Aug. 30 had not encouraged any hope that they would not. What might fairly be required of the respondents in regard to subsequent advertisements was not that they should "advertise their penitence," but that, in their own interests as well as in those of the appellants and the public, they should recognise that the effect even of an evening newspaper is not exhausted on the day of its publication, and that persons familiar with the advertisements issued before the writ might well continue to be misled by those issued after it, unless the latter series contained, as they did not, some disclaimer or correction of the former. I agree with SARGANT, J., in thinking that this suffices to support a claim for an injunction under the circumstances. Though the respondents gave no new offence they took their chance of profiting by the offence already given to the continuing detriment of the appellants. Though they were careful to do no new mischief they left the old mischief to work. As to the interim injunction, it protected the appellants only until trial, and would have fallen to the ground if they had abandoned the action. The disclaimer in the defence is less efficacious than an offer to undertake to the court, and the respondents took their own course in this regard at their peril. I think, therefore, that nothing occurred to disentitle the appellants to an injunction, which was strictly the appropriate remedy, and that the evidence of the effect of the advertisements on the trade, slight though it is, suffices to justify an inquiry as to damages. The costs of such inquiry and the measure of damages to be applied are, of course, not in any way governed by your Lordships' decision. It cannot be affirmed that no damage, or even that only nominal damage, has been sustained by a series of misleading advertisements in widely circulated newspapers at the beginning of the football season. Again, I think that Mr. Ritson's evidence supports this view. It is true that, although a good deal of time had elapsed before the trial came on, the appellants had only been able to collect an inconsiderable amount of evidence relating to actual damage, but that is not sufficient to deprive them of the usual inquiry at their own risk as to costs. The improbability of their proving much is not the same thing as the legal certainty that they can prove nothing.

LORD PARMOOR.—I concur in the opinion of LORD PARKER, and I only express my opinion out of respect to the Court of Appeal. The decision in this case depends upon the questions of fact, and I agree in the conclusions of SARGANT, J. No person has a right to offer for sale, or sell, goods of another trader of an inferior or different class, under conditions calculated to represent such goods as goods of the same trader of a superior and distinctive class. If any person offers to sell, or sells, the goods under such a representation, he commits an actionable wrong quite irrespective of motive or fraud. The plaintiff who establishes a case of this character is entitled to an injunction and, if necessary, to an inquiry into damages.

There is no satisfactory evidence that the respondents sold footballs of an inferior or different class as though they were the goods of the appellants of a superior and distinctive class. The real issue is, did the respondents in offering for sale the footballs described in the advertisements, to which objection is taken, make representations calculated to lead to the belief that these footballs were the "Improved Sewn Orb Football," Patent No. 15,168, of the appellants, as advertised in the appellants' catalogue for 1912. The appellants issued their catalogue

for 1912, and included therein the Improved Sewn Orb Football, Patent No. 15,168. In August, 1912, the respondents advertised in certain papers the Improved Orb Football, Patent No. 15,168. It is not necessary to compare in detail the terms of the advertisements with the terms of the catalogue, since it is admitted that the catalogue of the appellants was used as the basis from which to draw up the advertisements. This is said to have been a mistake. The court has to decide whether, apart from any sinister motive, the advertisements, or any of them, are reasonably calculated to deceive the public. In order to form a conclusion each advertisement must be considered as a whole in its entirety. I agree with the argument of counsel for the respondents that it is important to see whether the distinctive features associated with the superior class of goods of the appellants have been taken by the respondents in their advertisements. Taking this test, I think that the advertisements are calculated to represent that the respondents were offering for sale the same footballs as the appellants had catalogued in the catalogue for 1912. The advertisement which appeared in the "Regiment" of Aug. 31, 1912, carries the representation further than any other, but the series of advertisements attached to the case all point in the same direction. This advertisement contains the words, "The Improved Orb Football (Patent No. 15,168) is a great deal better than the old moulded form," and these words, taken in connection with the whole get-up of the advertisement, appear to me to suggest in plain terms that the football offered for sale by the respondents is the same article as the football of the appellants catalogued in the appellants' catalogue for 1912. After an interview between the respective managers of the appellants and respondents, the appellants issued their writ. Subsequently thereto the respondents wrote a letter which is set out in the statement of defence. The Court of Appeal treated this letter as contemporaneous with the issue of the writ, but I accept the view of SARGANT, J., and the letter, in my opinion, does not affect the right to a perpetual injunction, if, at the date of the issue of the writ, the appellants were entitled to such injunction.

It was argued on behalf of the respondents that there was no evidence beyond a comparison of the documents to show that the conduct of the respondents was calculated to deceive any member of the public. I think that there was some relevant oral evidence, but there is no necessity for such evidence if the court is satisfied, on the comparison of the documents before it, which it is for the court to construe, that the respondents did issue an advertisement calculated to represent that they were offering for sale the "Improved Sewn Orb Footballs" of the appellants included in their catalogue for 1912, whereas in fact the footballs so offered for sale were of a different and inferior class. Subsequently to the issue of the writ the respondents issued further advertisements. These advertisements, taken in connection with those already issued, appear to me, so far as they are relevant, to aggravate the original offence, and there is evidence that they deceived one of the witnesses, Ritson.

The amount of damages recoverable from the respondents is not before your Lordships, but I desire to express my concurrence with the view of SARGANT, J., that a tort having been committed, the plaintiffs are entitled to such damages as naturally flow from their unlawful act, and that there is no artificial limitation in the case of a passing-off action. I agree that the appeal should be allowed with costs.

Solicitors: *Lawrance, Webster, Messer, & Nicholls; Ward, Perks & Terry.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

A

JEFFERSON *v.* PASKELL

[COURT OF APPEAL (Swinfen Eady, Phillimore and Pickford, L.JJ.), October 14, 15 and 29, 1915]

[Reported [1916] 1 K.B. 57; 85 L.J.K.B. 398; 113 L.T. 1189; 32 T.L.R. 69]

B

Breach of Promise—Defence—Plaintiff unfit to marry at date fixed by reason of ill-health—Onus on plaintiff of proving that she became in good health within reasonable time—Honest and reasonable belief in plaintiff's unfitness to marry.

In an action for breach of promise of marriage the defendant alleged that the plaintiff was unfit to marry because she had contracted tuberculosis before the date fixed for the marriage and was still suffering from that disease at the commencement of the action. The plaintiff admitted that she was physically unfit to marry on the date fixed, but denied that her illness was tuberculosis.

C

Held: (i) the burden of proof was, in the first instance, on the plaintiff to prove that she was fit to marry on the date fixed or within a reasonable time thereafter; on this burden being discharged by primâ facie evidence of her fitness the onus passed to the defendant to prove his allegations; (ii) it was no defence to an action for breach of promise of marriage that the defendant honestly and reasonably believed that the plaintiff was so ill as to be unfit to marry.

D

Semble: mental or physical infirmity supervening after the promise, or first coming to the defendant's knowledge after the promise, may, in certain cases, justify a refusal to marry and afford a defence to an action for breach of promise.

E

Notes. Considered: *Bedford* v. *Cowtan*, [1916] 1 K.B. 980. Referred to: *Cohen* v. *Sellar*, [1926] All E.R.Rep. 312.

F

As to breach of promise, see 19 HALSBURY'S LAWS (3rd Edn.) 769–774; and for cases see 27 DIGEST (Repl.) 29 et seq.

Cases referred to:

(1) *Baddeley* v. *Mortlock* (1816), Holt, N.P. 151, N.P.; 27 Digest (Repl.) 30, *72*.

(2) *Hall* v. *Wright* (1859), E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 27 Digest (Repl.) 31, *84*.

G

Also referred to in argument:

Baker v. *Cartwright* (1861), 10 C.B.N.S. 124; 30 L.J.C.P. 364; 7 Jur.N.S. 1247; 142 E.R. 397; 27 Digest (Repl.) 32, *86*.

Atchinson v. *Baker* (1796), Peake, Add. Cas. 103; 27 Digest (Repl.) 31, *83*.

H

Liddell v. *Easton's Trustees*, [1907] S.C. 154; 44 Sc.L.R. 140; 14 S.L.T. 479; 27 Digest (Repl.) 32, **47*.

Allen v. *Baker* (1882), 41 Am. Rep. 444.

Bloomer v. *Bernstein* (1874), L.R. 9 C.P. 588; 43 L.J.C.P. 375; 31 L.T. 306; 23 W.R. 238; 39 Digest 570, *1757*.

Morgan v. *Bain* (1874), L.R. 10 C.P. 15; 44 L.J.C.P. 47; 31 L.T. 616; 23 W.R. 239; 39 Digest 570, *1754*.

I

Foulkes v. *Sellway* (1800), 3 Esp. 236, N.P.; 27 Digest (Repl.) 31, *80*.

Jones v. *Spencer* (1897), 77 L.T. 536; 14 T.L.R. 41, H.L.; 30 Digest (Repl.) 287, *579*.

Application for judgment or a new trial in an action tried before BRAY, J., and a special jury.

The action was brought by Lillian Ida Jefferson, against Ernest C. Paskell, to recover damages for breach of promise of marriage. By his defence the defendant

pleaded that before the date fixed for the intended marriage the defendant discovered that during March, 1913, the plaintiff had contracted the disease of tuberculosis, and was so ill that she was not able to be married, and was advised by her medical advisers that she could not marry. The defendant further said that the disease was an infectious disease, and the defendant could not have married the plaintiff without serious risk of himself contracting the disease; the plaintiff was not at any material time in a fit state of health to have children; she had continued to suffer from the disease from March 27, 1913 (or thereabouts) until the commencement of the action; and by reason of these facts the defendant became entitled to, and did validly rescind the contract of marriage, and thereafter ceased to be bound to marry the plaintiff. At the trial the defendant obtained leave to raise by way of amendment a further defence that he honestly and on reasonable grounds believed the plaintiff to be in such a condition as to be unfit for marriage.

The action was tried by Bray, J., and a special jury in November, 1914, when questions were left to the jury, which with the answers thereto were as follows: (i) Was the plaintiff suffering from tuberculosis (a) between Mar. 28 and April 15, 1913?—Answer: The evidence the jury have heard is not sufficient to satisfy them that the plaintiff was suffering from tuberculosis between Mar. 28 to April 15. (b) On Sept. 12?—Answer: No. (ii) Was the plaintiff on Sept. 12 in such a condition as to be unfit for marriage within a reasonable time after that day?—Answer: No. (iii) Did the defendant on the said day honestly and on reasonable grounds believe her to be in such a condition as to be unfit for marriage within a reasonable time after Sept. 12?—Answer: No. (iv) Did he refuse to marry her on that ground?—Answer: No. (v) What damages do you find?—£500. Bray, J., gave judgment for the plaintiff for £500. The defendant appealed, and asked for judgment, or in the alternative for a new trial, upon the grounds of misdirection and that the verdict was against the weight of the evidence. The passages in the learned judge's summing-up to the jury which were relied upon as being a misdirection were the following: The learned judge at the commencement of his summing-up to the jury said:

> "The promise is admitted, and of course it is perfectly clear that there was a promise. It is also quite clear that there was a refusal to marry. The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract. He says that the lady's health was such that she was unfit to be married, and there is no doubt that if it be proved that her health was in fact in such a condition that she could not be married within a reasonable time, the defendant would be entitled to refuse to marry her."

Later the learned judge said:

> "Now I must say something about the particular issues which you have to decide. Was the plaintiff suffering from tuberculosis (a) between Mar. 28 and April 15? (b) on Sept. 12, 1913? The first part I have asked at the request of the defendant's counsel, but to my mind the material question is on Sept. 12, because that is when the breach, if there was a breach, took place. You have heard the evidence of the doctors. I must tell you with regard to this that the onus of proof is on the defendant. He has to prove this, and therefore if the evidence leaves you in doubt as to whether she was suffering or not you must say 'No,' or, if you like to put it in that way, 'We are not satisfied,' you can put it in that way; but the plaintiff is entitled to have your verdict upon that point in her favour unless the defendant has satisfied you of what he alleges—namely, that she was suffering from tuberculosis."

And further on he said:

> "The next question is this: Was the plaintiff on Sept. 12 in such a condition as to be unfit for marriage within a reasonable time after that day? There, again, it is for the defendant to satisfy you that she was unfit to be married

within a reasonable time after that day. Of course that depends to a great extent upon the view you take as to whether she was suffering from tuberculosis. Of course, if you thought she was substantially suffering from tuberculosis on Sept. 12, then you would probably think that she was unfit for marriage."

McCall, K.C., and *H. St. J. Field* for the defendant.
Marshall-Hall, K.C., and *H. Maddocks* for the plaintiff.

Oct. 29. The following judgments were read.

SWINFEN EADY, L.J.—The defendant on this appeal asks for judgment or a new trial, the plaintiff having obtained a verdict and judgment for £500 damages. The action is for breach of promise of marriage. [His Lordship stated the facts as above set out and continued:] The defendant complains of misdirection, and that the verdict was against the weight of the evidence; he also complains of insufficient direction, that the jury did not have such assistance from the judge as they were entitled to; and he relies especially upon the fact that in dealing with the X-ray examination of the plaintiff the judge did not in his summing-up refer to the fact that Dr. Harman Brown was present on behalf of the plaintiff, but was not called at the trial. The misdirection complained of is that the judge wrongly ruled that the breach of contract was in September. It was contended that he ought either to have left the date to the jury, or to have ruled that the date was either April 14, when the letter to the father was written, or in May, when the contents of it were communicated to the plaintiff, or July 29, the last interview with the plaintiff, when the defendant certainly refused to marry the plaintiff. The further misdirection complained of is that the judge told the jury that the burden of proof was on the defendant. The judge said (in an early part of his summing-up): "The defendant sets up, and it is for him to prove his case, that by reason of certain circumstances he was justified in refusing to marry, and therefore there was no breach of contract." And again, later on in his summing-up he said this: [His Lordship read the second passage of BRAY, J.'s summing-up set out above.]

In considering this case, the main contention on the one side and on the other must always be borne in mind. It being common ground that on the actual date fixed for the marriage (April 9, 1913) the plaintiff was unwell, and that it was quite obvious that the wedding must be postponed on that account, the defendant alleges that she was then suffering from tuberculosis, that he produced medical evidence to that effect, and that she had not recovered from this disease by September, and therefore certainly not by July. The plaintiff's case, on the other hand, is that she was suffering in April from the effects of a chill caught perhaps on Mar. 27; that she had an attack of pleurisy, but not tuberculosis, that she never suffered from tuberculosis; that she was well by May 27, 1913, when examined by Dr. Fligg; that in July, 1913, when she met the defendant on his return from America, she was in complete health; that the certificate given by Dr. Fligg on Aug. 12, 1913, was completely true; that she was then in good health; and that the contention that two or three months previously she had been in consumption was quite unfounded. Those were the principal contentions of the respective parties.

The plaintiff's pleading contains by implication (Ord. 19, r. 14) an allegation that she is and always has been ready and willing to marry the defendant. The defendant meets this by alleging (para. 3 of the defence) that on Mar. 27, 1913 (before the date fixed for the wedding), he

> "discovered, as the fact was, that . . . the plaintiff had contracted the disease of tuberculosis, [and] the plaintiff continued to suffer from the said disease from Mar. 27, 1913 (or thereabouts) until the commencement of this action";

and in para. 5 of his defence he pleads that by reason of the facts mentioned in para. 3 the plaintiff was never ready and willing to marry the defendant. The

plaintiff having given general evidence of her good health within a short time after the date fixed for the wedding, the burden of proving that she was then suffering from the disease of tuberculosis rested upon the defendant, who alleged it. The defendant alleging and the plaintiff denying the existence of the disease, the burden was not upon her of proving the negative, but upon the defendant to prove his allegation: Ei qui affirmat non ei qui negat incumbit probatio. This is the burden of proof to which the judge referred in his summing up. It is true that the judge did not point out to the jury that in the first instance the burden was upon the plaintiff to prove that she was ready, in the sense of being in a state of bodily fitness, and no longer prevented, by the state of her health, as she admittedly was on April 9, yet this burden was primâ facie discharged by the plaintiff's appearance at the trial apparently in good health, and by the medical evidence called on her behalf, and the real and substantial question between the parties was whether the plaintiff was suffering from tuberculosis, as alleged by the defendant, and the burden of proving this was upon the defendant, who alleged it. The point as to the burden of proof in the first instance is, in the present case, an academic one.

With regard to the other alleged misdirection, namely, the judge ruling that the breach was in September, instead of either leaving it to the jury or holding it to have been on April 14 or in July, it is manifest that the letter of April 14 did not then amount to a breach, as it was not written to the plaintiff and did not come to her knowledge until after she had been in the sanatorium about five weeks. No point was made at the trial as to whether the breach was in July or September; the jury negatived that the plaintiff was suffering from tuberculosis on Sept. 12, 1913, and there was no evidence of any change in the plaintiff's condition between July and September. There was evidence that in July the defendant absolutely refused to marry the plaintiff, but no question of whether there was a breach in July is raised by the pleadings; the plaintiff alleges a refusal by the letter of Sept. 12, and the defendant does not dispute this, but sets up a rescission in April, which was not substantiated. Nor do I find from the short-hand notes that the judge was asked to leave to the jury any question of a breach in July, although at one time when Dr. Thurnham was in the witness-box the judge said that one question for the jury would be whether the refusal at the end of July was justified.

Under these circumstances I am of opinion that no substantial wrong or miscarriage has been occasioned by the judge directing the jury that there was no breach before Sept. 12, and a new trial ought not to be ordered on that account.

The defendant by amendment raised a further point, by way of defence, that he honestly and on reasonable grounds believed the plaintiff to be unfit for marriage. The jury negatived this in fact, and the defendant says that the verdict of the jury on this point is against the weight of evidence. In my opinion this point, even if the jury had found in the defendant's favour, would be no defence in law. If the plaintiff was not in fact unfit for marriage, the fact that the defendant honestly and on reasonable grounds believed that she was unfit might affect the amount of the damages, but would not affect the plaintiff's right to recover. And no complaint is made by the defendant that the damages are excessive. The case of *Baddeley* v. *Mortlock* (1) is in point. It was an action for breach of promise brought by a man against a woman. The woman, having heard of charges being made against the man of dishonesty and perjury, said that unless he vindicated himself she would not marry him, and upon his omitting to do so broke off the match. It appears from the judgment that the mere belief that the charges were true was no defence in law. Gibbs, C.J., said (Holt, N.P. at p. 152):

> "She must show that the plaintiff is a man of bad character. . . . Without proof that the charges were founded, she is not absolved from her contract. But it affects the damages."

The plaintiff recovered a verdict for one shilling damages.

[His Lordship then dealt with the point about the X-ray examination, and also with the contention that the verdict was against the weight of evidence. There was medical evidence each way, and the contention could not, in his opinion, be supported.]

The other matters complained of in the summing up are of minor importance, and I am satisfied that no substantial wrong or injustice has been occasioned to the defendant by any of the matters complained of. In my opinion the appeal fails and should be dismissed.

PHILLIMORE, L.J.—The plaintiff, a young woman of twenty-two, brings this action for breach of promise of marriage against the defendant, a man of thirty-nine. In her statement of claim she alleges an engagement in 1912, and the fixing of the day of marriage, first for Mar. 28, and then for April 9, 1913, and the breach of which she complains is that the man did not marry her then or within a reasonable time thereafter. She also states, but apparently rather as evidence or confirmation of the breach than as in itself a breach, a positive refusal by letter on Sept. 12. In his defence the man admits the engagement in 1912, though not so early in the year, and the fixing of the date of marriage for April 9. He proceeds to state that by letter dated April 14 he refused to marry the woman, and he justifies his refusal by saying that she had contracted tuberculosis. He further pleads that she was never ready and willing to marry him.

The jury had the advantage of seeing the woman and judging of her appearance at the trial in July, 1914. The Lord Justice has stated the questions put to the jury and their answers. I will deal first with the questions 3 and 4, which were put in consequence of an amended defence which the man was allowed to raise at the trial, to the effect that he honestly believed her to be unfit for marriage within a reasonable time; and it is best in the first instance to determine upon its validity. I am of opinion that it is not a valid defence. A contract of marriage is in this respect like any other contract. The justification for the refusal to carry it out must be found in the actual facts, and not on belief or opinion, however reasonable or honest, as to what the facts are. If instead of want of health the question had been one of want of chastity, it will be very apparent that the objective truth, and not the subjective belief, would have to be looked for. This being so, it is unnecessary to inquire whether the answers of the jury to the two questions 3 and 4 were or were not justified by the evidence.

Another point lies in limine. It was contended by counsel for the woman that ill-health is not a justification for refusal to perform the promise to marry, and for this the case of *Hall* v. *Wright* (2) was cited. This case has been much observed upon, but it is unnecessary to consider its weight, because it has no bearing upon the one before us. In *Hall* v. *Wright* (2) the man pleaded his supervening ill-health as his justification for refusal. The woman was willing to marry him notwithstanding. Whether the decision was that in no case could a party rely on his or her own ill-health as a justification, or whether, as some have thought, the case turned upon a point of pleading or upon the insufficiency of the degree of ill-health pleaded, it has no bearing upon a case where the ill-health is that of the insisting party. On principle it would seem that there must be some cases of mental or physical infirmity (as it has been decided that there are cases of moral infirmity) which, supervening after the promise or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry. The matter is therefore clear for considering questions and answers 1 and 2. It is contended for the man that the answers are unreasonable and that the verdict is against the weight of evidence and should be set aside. It is further contended that there was misdirection. After consideration and reading the medical evidence again, I do not think that the balance is so strongly the other way that, if the jury was properly directed, the verdict could be set aside.

There is more difficulty about the misdirection. Two complaints are made: (i) That the date of the breach was material, and the judge assumed the date most favourable to the woman, whereas he ought to have taken another date, or at least have left it to the jury. (ii) That, whenever he dealt with the burden of proof, he put it upon the man. There are certainly points in the handling of the case by the learned judge which are not satisfactory and which put difficulty in the way of the woman keeping her verdict. We have to see if they are sufficient to entitle the man to a new trial. As to (i), the woman in her statement of claim gave, as already stated, no precise date for the breach, stating it merely as a refusal to marry within a reasonable time after Mar. 28 or April 9. The man put the breach when his solicitor's letters of April 14 would be received. The judge intimated most strongly his opinion that the true date was Sept. 12, and though, upon the insistence of the man's counsel, he put question 1 with alternative dates, he gave no such alternative for question 2. There are four possible dates, April 15, an early day in May, July 29, and Sept. 12. I agree that April 15 as an exact date may be ruled out. The letter was not to her, and for reasons of kindness to her it was not intended to reach her then. But it was intended to reach her in time, and it did reach her early in May. The date in May on which she had knowledge of the letter of April 14 is important. If there was no breach in May there almost certainly was on July 29, and it was wrong to suggest that the breach did not take place until Sept. 12. But though the judge did once intimate that the July date might be the right one, neither side asked him to put the July date, and there was no evidence that the state of the woman's health materially differed from July 29 to Sept. 12. The two dates, therefore, to be discussed were early May and Sept. 12, and unfortunately the judge never left to the jury the question which was the right one.

Upon the other question the learned judge directed the jury that the burden of proof that the woman was unfit for marriage on Sept. 12, which is the date he takes, was on the man. In this he is in my view wrong. In every contract the party who seeks to recover damages for the breach must prove that he or she was ready and willing to perform it. Now admittedly on the date fixed for the marriage, that was April 9, the woman was not ready—she was not fit. The burden of proof was upon her to show that she would be fit within a reasonable time or that she actually became fit before the breach. There was no burden upon the man to show that she was unfit. But when the woman admitted that she was not fit on April 9 she admitted no more. She did not admit that she had a permanent or even a prolonged illness. The man, if he relied on her having tuberculosis or any other permanent or prolonged illness, had to prove it, and the learned judge rightly laid the onus on him so far, and the question was rightly put as to tuberculosis, Are you satisfied that she had it? If she did have tuberculosis in April or in September, then all she has to prove is that from whatever illness she had in April either she would recover in a reasonable time, or did actually recover before breach. And if it was not tuberculosis in April, if for instance it was pneumonia or even pleurisy, there is no serious question that she had recovered by the end of July. The jury were rightly directed upon question 1, and if their verdict on this question was right, the misdirection upon question 2 becomes unimportant, nor does it matter which was the date of the breach. The misdirections, therefore, both as to date of breach and as to burden of proof, come within Ord. 39, r. 6, no "substantial wrong or miscarriage has been thereby occasioned," and do not compel us to grant a new trial. If she had not tuberculosis in April, she had only an illness which would not prevent her marrying within a reasonable time. It matters not whether the breach was in April or May or July or September. If it was either of the two former, she was not in a state of health which justified the man in thinking that she would not be fit to marry within a reasonable time. If it was either of the two latter, she had recovered and so plainly recovered (tuberculosis being out of the way) as to make the burden of proof an academical question. Upon the whole, though, as I have

said, there were in my opinion misdirections, they were not of sufficient importance to have affected the verdict, and we ought not to grant a new trial.

PICKFORD, L.J.—This was an action for breach of promise of marriage in which judgment was given for the plaintiff. The defendant by his appeal asks for judgment or a new trial, but in substance his application is for a new trial upon the grounds of misdirection and of the verdict being against the weight of evidence.

The defence set up to this action by the defendant was that the plaintiff was suffering from tuberculosis on Mar. 27, 1913, and from that date continuously until the commencement of the action. He also, by amendment during the trial, alleged as a defence that he reasonably believed her to be so suffering, and was on that ground exonerated from his promise. The questions put to the jury and their answers have already been stated, and I need not repeat them. I do not think that, strictly speaking, the right questions were put to the jury, but if the first finding stands, this is of no consequence, as the only suggested defence was tuberculosis, and there is no ground for contending that if she were not suffering from that disease in March and April, 1913, she ever suffered from it at all. With regard to the defence raised by amendment, the plaintiff contended that it was no defence of a breach of promise to marry that the defendant reasonably believed that the plaintiff was so ill as to be unfit to marry, if in fact that belief was wrong. I am of opinion that this contention is correct, and that such reasonable but unfounded belief affords no defence. The plaintiff also contended, that even if she were suffering from tuberculosis, that afforded no defence, while the defendant's contention seemed to me to go so far as to allege that if a woman had ever suffered from that disease she could never enforce a promise to marry. I am not prepared, as at present advised, to accept a contention so wide as the defendant's, but I think there may be tuberculosis existing to such an extent, and of such a nature as to make the woman unfit for marriage, and therefore to afford a defence.

It remains, therefore, to be seen whether the jury's answer to the first question can be supported. The defendant alleged the breach of the promise to have taken place on April 14, the plaintiff on Sept. 12. I am not satisfied that either of these was the correct date, but if the first answer is correct the date becomes immaterial. The defendant objects to this finding, first, on the ground of misdirection, and the misdirections alleged are, in substance, that the learned judge was wrong in directing the jury that the onus of proving that the plaintiff was suffering from tuberculosis and unfit for marriage was upon the defendant, and that he misled them by insufficient and incorrect directions as to the evidence. The passages as to the onus of proof to which objection was chiefly taken are those read by SWINFEN EADY, L.J. I think that the plaintiff in an action of breach of promise, as in any other action of breach of contract, must prove that she is ready and willing to perform the contract, and an allegation to that effect was always contained in the older and more precise pleadings, and is now, according to Ord. 19, r. 14, to be implied. "Ready" includes, in my opinion, not being unfit by reason of illness. But very slight evidence is sufficient to discharge such an onus in the absence of contradiction, such as that she was following the ordinary pursuits of life. This case is not quite so simple, as the plaintiff was, on the date fixed for the marriage, admittedly unfit to carry out the contract by reason of illness. The obligation on the defendant then became one to marry her in a reasonable time after that date, and I think there was the obligation upon her to show that a reasonable time had elapsed, and that she was ready and willing. But again I do not think that much evidence was necessary to enable her to discharge that onus, and I think she discharged it. She showed that she began almost at once to improve in health, and continued to do so, that in May and onwards she was following the ordinary avocations of life, and that the doctor who attended her considered her in good health. This would, unless displaced by evidence given on behalf of the defendant, entitle her to succeed on that question,

and it was therefore necessary for the defendant to give such evidence and displace that given for the plaintiff. This he undertook to do by showing that she was in March and April suffering from tuberculosis, and therefore, although apparently well, was not really so, and was unfit for marriage. Unless he proved this, there was nothing to displace the case made by the plaintiff. This was the state of the evidence upon which the learned judge was directing the jury, and therefore, though I am not satisfied that his direction as to the onus of proof was strictly correct, I think it not unfairly represented the matters to be considered by the jury, and that even if it were not strictly correct they were not misled, and there was no miscarriage of justice in consequence of its incorrectness.

With regard to his direction as to the evidence, I think a judge is entitled to give the jury his views of the evidence, and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the matters they have to consider, or the evidence in the light of which they must consider them. I cannot see that the learned judge has done so in this case. Perhaps after so lengthy a trial he might have discussed the medical evidence in somewhat more detail, but I can see no reason for saying that the jury were in any way misled. I think there is no objection to the finding on the ground of misdirection.

Then, if the jury were properly directed, I do not think the verdict can be disturbed on the ground that it was against the weight of evidence. I do not think it necessary to go through the evidence. I think there was material upon which the jury could reasonably come to their conclusion, and it is material to notice that on this point the learned judge, who, like the jury, saw and heard the witnesses, agreed with the verdict. I do not, therefore, think that the first finding of the jury should be disturbed, and in that case it is unnecessary to consider the rest of the case; but I think it right to say that, if it were necessary to consider it, I have great doubt whether the third and fourth answers could be supported on the evidence. In my opinion the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Maddocks & Colson*, for *Band, Hatton & Co.*, Coventry; *Field, Roscoe & Co.*, for *Ansell & Sherwin*, Birmingham.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re BENTLEY. PUBLIC TRUSTEE *v.* BENTLEY

[CHANCERY DIVISION (Astbury, J.), July 10, 28, 1914]

[Reported [1914] 2 Ch. 456; 84 L.J.Ch. 54; 111 L.T. 1097]

Public Trustee—Annuity—Life annuity—Income fee—Incidence—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 9, *s.* 15—*Public Trustee* (*Fees*) *Order*, 1912 (*S.R. & O.* 1912 *No.* 417), *r.* 1, *Schedule* (*Division* 3).

The Public Trustee must charge the income fee payable to him in respect of life annuities bequeathed by a will against those annuities, and not take it out of residue.

Notes. The Public Trustee (Fees) Order, 1912, has been revoked. See now the Public Trustee (Fees) Order, 1957 (S.I. 1957, No. 485), which introduced a simplified system of charging fees. The system of charging fees in the Public Trustee Office has been amended by the Public Trustee (Fees) Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 1177).

Considered: *Re Hulton, Midland Bank Executor and Trustee Co.* v. *Thompson*, [1936] 2 All E.R. 207. Not Followed: *Re Riddell, Public Trustee* v. *Riddell*, [1936] 2 All E.R. 1600. Considered: *Re Wells, Public Trustee* v. *Wells*, [1940] 2 All E.R. 68.

As to the public trustee, see 33 HALSBURY'S LAWS (2nd Edn.) 336 et seq.; and for cases see 43 DIGEST 1033 et seq. For the Trustee Act, 1906, ss. 9, 15, see 26 HALSBURY'S STATUTES (2nd Edn.), 40, 45.

Originating Summons.

A testatrix by her will, dated April 16, 1910, after appointing executors and trustees and bequeathing certain pecuniary and specific legacies, bequeathed four life annuities, together amounting to £310 a year, and continued:

"And I authorise my trustees to provide for the payment of the said annuities either by appropriating for that purpose a fund which shall consist of stocks, funds, shares, or securities hereinafter authorised as investments and of which the annual income at the time of appropriation shall be sufficient to answer such annuities, with power in case of the income of the appropriated fund at any time proving insufficient to resort to the capital fund for payment of such annuities, and so that upon the death of each of the said annuitants a proportionate part of the capital of the same fund or so much thereof as shall not have been resorted to as aforesaid shall in any case revert to and form part of my residuary estate, or by purchasing like annuities in the names of the annuitants respectively or in the names of my trustees from the Government or any public company to be applied accordingly. And until the said annuities respectively shall be provided for in one or other of the modes aforesaid I direct that the same shall be paid out of the income of my residuary estate. But I declare that when and so soon as any such annuity shall have been so provided for such provision shall be a complete satisfaction of the trusts to provide for the same annuity which shall thereafter cease to be charged upon either the income or the capital of my residuary estate. . . . I further direct that all duties payable in respect of the pecuniary or specific legacies aforesaid or in respect of any of the annuities aforesaid shall be paid out of my residuary personal estate."

The testatrix then devised her residuary real and personal estate to her trustees on trust for sale and conversion and directed them out of the proceeds to pay her funeral and "testamentary expenses," debts, and legacies and "make provision for payment of the said annuities" and pay the legacy and other duty on legacies of annuities bequeathed free of duty and to invest the residue in stocks, funds, shares, or securities therein mentioned and to hold the same on the trust for

certain residuary legatees, two shares being settled and one being given absolutely. The testatrix died on Oct. 28, 1912, and on Feb. 8, 1913, administration with the will annexed was granted to the Public Trustee, the executors having renounced and disclaimed. In November, 1913, the Public Trustee appropriated investments producing £310 4s. 10d. gross income to answer the four annuities which admittedly had to bear their own income tax. He had partly distributed the third share of residue given absolutely, and the balance of that share was now distributable. In the events which had happened he now held the other two third shares, producing about £156 gross income, in trust for the defendant Clement Bailey for life, with remainders over. The Public Trustee issued this summons on May 1, 1914, to determine (inter alia) whether the £2 per cent. income fee payable to him in respect of the annuities ought to be borne by those annuities or by the income or capital of the residue. The Public Trustee as from Dec. 1, 1913, had commuted the income fee on the annuities at £56 and charged that sum in equal shares to the income of the three shares of residue, but this was done without the assent of the defendant Bentley. However, the Public Trustee now asserted he was ready to re-adjust that according to any decision the court might give.

The Public Trustee Act, 1906, provides as follows:

"9 (1). There shall be charged in respect of the duties of the public trustee such fees, whether by way of percentage or otherwise, as the Treasury with the sanction of the Lord Chancellor may fix, and such fees shall be collected and accounted for by such persons, and in such manner, and shall be paid to such account, as the Treasury direct. (2) Any expenses which might be retained or paid out of the trust property if the public trustee were a private trustee shall be so retained or paid, and the fees shall be retained or paid in the like manner as and in addition to such expenses. . . . (5) The incidence of the fees and expenses under this section as between capital and income shall be determined by the public trustee."

"15. In this Act, unless the context otherwise requires, . . . the expression 'trust property' shall include all property in the possession or under the control wholly or partly of the public trustee by virtue of any trust: . . . the expression 'expenses' includes costs and charges. . . ."

The Public Trustee (Fees) Order, 1912, provides as follows:

"1. In this Order and in the Schedule hereto (unless the context otherwise requires) . . . (c) The expression 'income of the trust property' includes any income arising under the trust."

Division 3 of the Schedule provides:

"Income fees in respect of the duties of the public trustee, acting in any of the capacities mentioned under Division 2 [i.e., as ordinary trustee or executor or administrator, etc.]: Upon the annual income of the trust property (where that income is not less than £2), a fee at the rate of £2 per cent. in respect of that income up to £500," with modifications for higher amounts.

Percy Wheeler for the Public Trustee.

Frank Russell, K.C., and *A. M. Bigg* for Clement Bentley, the life tenant of two-thirds of the residue.

John Beaumont for the remaindermen.

Beddall for the annuitants.

ASTBURY, J.—I have no authority to guide me in this case, but, primâ facie, I should have thought that the income fee, from its very name, ought to come out of the pocket of the person receiving the income. It is really a fee to recoup the public trustee for seeing to the investments and paying the income to the life tenant of residue or the annuitants, as the case may be. I think the fair

thing is to pay the income fee attributable to the annuities out of those annuities and the income fee attributable to the balance of the income out of that balance, and I so decide. The matter must be re-adjusted on that footing as from the testatrix's death, as my decision applies equally to the period before appropriation as to the period after appropriation. It is admitted by everyone that the commutation cannot stand, and the public trustee is ready to re-adjust that matter. I think this is the fairest decision I can give in the absence of anything further to guide me.

Solicitors: *G. & G. Keith*; *Duffield, Bruty, & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

THEATRE DE LUXE (HALIFAX), LTD. *v.* GLEDHILL

[King's Bench Division (Lush, Rowlatt and Atkin, JJ.), December 16, 1914]

[Reported [1915] 2 K.B. 49; 84 L.J.K.B. 649; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 13 L.G.R. 541; 24 Cox, C.C. 614]

Cinematograph—Licence—Condition—Restriction as to age of children allowed to enter theatre—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 2 (1).

By s. 2 (1) of the Cinematograph Act, 1909: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid [i.e., cinematograph exhibitions] on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine." The appellants were granted a licence subject to the following conditions: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m."

Held (Atkin, J., dissenting): there being no connection between the cinematograph exhibition and the ground on which the condition was imposed, e.g., the health and welfare of children generally, the condition was ultra vires.

Notes. Distinguished: *Ellis* v. *North Metropolitan Theatres*, [1915] 2 K.B. 61; *R.* v. *Burnley Justices, Ex parte Longmore*, [1916–17] All E.R.Rep. 346. Considered: *Stott* v. *Gamble*, [1916–17] All E.R.Rep. 724; *Ellis* v. *Dubowski*, [1921] All E.R.Rep. 272. Distinguished: *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corpn.*, [1947] 1 All E.R. 498. Referred to: *Ex parte Stott* (1915), 32 T.L.R. 84; *Harman* v. *Butt*, [1944] 1 All E.R. 558.

As to cinematograph entertainments, see 32 Halsbury's Laws (2nd Edn.) 72 et seq.; and for cases see 42 Digest 919 et seq. For the Cinematograph Act, 1909, s. 2, see 25 Halsbury's Statutes (2nd Edn.) 40.

Case referred to:

(1) *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.*, [1911] 1 K.B. 445; 80 L.J.K.B. 141; 103 L.T. 760; 75 J.P. 53; 27 T.L.R. 141; 9 L.G.R. 79, D.C.; 42 Digest 921, *164*.

Also referred to in argument:

Rossi v. *Edinburgh Corpn.*, [1905] A.C. 21; 38 Digest (Repl.) 180, **449*.

Macdonald v. *Lochrane* (1887), 51 J.P. 629; 3 T.L.R. 464, D.C.; 38 Digest (Repl.) 170, *60*.

Fielding v. *Morley Corpn.*, [1899] 1 Ch. 1; 67 L.J.Ch. 611; 79 L.T. 231; 47 W.R. 295, C.A.; affirmed, [1900] A.C. 133; 69 L.J.Ch. 314; 82 L.T. 29; 48 W.R. 545, H.L.; 42 Digest 604, *52*.

Scott v. *Pilliner*, [1904] 2 K.B. 855; 73 L.J.K.B. 998; 91 L.T. 658; 68 J.P. 518; 53 W.R. 284; 20 T.L.R. 662; 2 L.G.R. 1018; 20 Cox, C.C. 731, D.C.; 25 Digest 436, *333*.

Ex parte Richards (1904), 68 J.P. 536; 20 T.L.R. 669; sub nom. *R.* v. *Ilkeston Licensing Justices*, 68 J.P.Jo. 352, D.C.; 42 Digest 920, *153*.

Groh v. *Hesketh*, [1907] 2 K.B. 232; 76 L.J.K.B. 787; 97 L.T. 129; 71 J.P. 339; 23 T.L.R. 501, D.C.; affirmed, [1908] 1 K.B. 654; 77 L.J.K.B. 481; 98 L.T. 263; 72 J.P. 114; 24 T.L.R. 269; 52 Sol. Jo. 239, C.A.; 30 Digest (Repl.) 80, *614*.

R. v. *Beesley, Ex parte Hodson*, [1912] 3 K.B. 583; 77 J.P. 19; sub nom. *R.* v. *Birmingham Licensing Justices, Ex parte Hodson*, 82 L.J.K.B. 23; 29 T.L.R. 9, D.C.; 30 Digest (Repl.) 31, *209*.

Teale v. *Williams*, post; [1914] 3 K.B. 395; 83 L.J.K.B. 1413; 111 L.T. 258; 78 J.P. 383; 12 L.G.R. 958; 24 Cox, C.C. 283, D.C.; 42 Digest 842, *3*.

Case Stated by justices of the peace in and for the county borough of Halifax. At a court of summary jurisdiction sitting at Halifax on June 26, 1914, the respondent, James William Gledhill, chief inspector of police at Halifax, preferred an information against the appellants, Theatre de Luxe (Halifax), Ltd., charging that, on June 2, 1914, at Halifax, the appellants, being the occupiers of certain premises known as the Theatre de Luxe situate in Northgate, Halifax, did unlawfully allow the premises to be used for the exhibition of pictures or other optical effects by means of a cinematograph for the purposes of which inflammable films were used in contravention of a certain condition subject to which the licence relating to the premises had been granted under the provisions of the Cinematograph Act, 1909. The following facts were proved or admitted: The appellants were, on June 2, 1914, the occupiers of the premises known as the Theatre de Luxe, Northgate, Halifax. The licence under the Cinematograph Act, 1909, in respect of the premises which had been granted by the justices for the borough of Halifax was current on June 2, 1914. The licence had been granted to the appellants by the justices under s. 5 of the Cinematograph Act, 1909, the justices having had the powers of granting licences delegated to them as the licensing authority by the Halifax County Borough Council. The condition in question was as follows:

> "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m."

On June 2, 1914, two children under the age of ten years—Lilian Raisbeck, aged five years, and Phyllis Carter, aged two years and five months—were on the appellants' licensed premises at ten minutes past nine when pictures were being shown in the theatre, and the appellants had allowed the children to be on their licensed premises at such time. The justices found as a fact that the appellants had allowed their licensed premises to be used in contravention of the condition subject to which the licence for the premises had been granted under the Cinematograph Act, 1909.

It was contended on behalf of the appellants that, notwithstanding the matters proved as aforesaid, the appellants ought not to be convicted of the offence charged against them in the information on the ground that the condition was illegal as being ultra vires, and one which the licensing authority had no power to impose, in that it was (i) unreasonable; (ii) neither clear, positive, nor definite; (iii) in restraint of trade; and (iv) beyond the powers given by the Cinematograph Act, 1909, the preamble of which indicated that the licensing authority in imposing conditions is limited to such conditions as concern the public safety only. It was

contended on behalf of the respondent that, under s. 2 of the Cinematograph Act, 1909, the licensing authority had full discretion to impose any reasonable condition they might think desirable in the public interest; that they were not limited to conditions relating only to public safety; and that the conditions which the appellants were charged with contravening was a reasonable condition having regard to the health and well-being of young children in the borough of Halifax.

The justices were of opinion that the respondent's contentions were correct, and that the condition was neither unreasonable nor ultra vires, and they accordingly convicted the appellants of the offence charged. The appellants now appealed.

Tindal Atkinson, K.C., and *Gingell* for the appellants.
Montgomery, K.C., and *Bruce Williamson* for the respondent.

LUSH, J., stated the facts, and continued: The question that was raised before the justices and the question that is raised here is whether the condition is or is not ultra vires. It was not disputed by counsel for the respondent that, if the condition is ultra vires, then, although the licence was given and accepted with that condition, the person summoned is entitled to take advantage of the contention that it is ultra vires; and, if it is ultra vires, then, of course, the conviction is bad and cannot be sustained. The question, therefore, is whether that condition was or was not within the power of the local authority to impose. The Cinematograph Act, 1909, has this title, "An Act to make better provision for securing safety at Cinematograph and other Exhibitions," and by s. 1 it is provided that the Act shall only operate in a case of cinematograph apparatus with inflammable films; and there is no doubt, as counsel for the respondent said, that there is very considerable room for argument that the terms and conditions which the licensing authority have power to impose by s. 2 are terms and conditions for giving proper effect to the disclosed object of the statute, which is to make provision for safety and nothing else. However, that question we are not at liberty to consider, because it has been dealt with and decided by the Divisional Court in *L.C.C.* v. *Bermondsey Bioscope Co., Ltd.* (1), where the court came to the conclusion that the power to impose conditions was not limited to matters of safety; therefore, that decision, which binds us, decides that is not a proper limitation to place on the powers of the licensing authority under that section. But the court, though it held that this limitation about safety does not apply, does not appear to me to have laid down or to have attempted to lay down any sort of test as to what limit still may be placed on the powers of the licensing authority to impose terms and conditions. The condition was one against opening on Sundays, Good Friday and Christmas Day, and it was pointed out that that condition was only a condition which compelled the licensee to obey the existing law because it was forbidden to open such places on Sunday by the Sunday Observance Act. There was no limitation in terms, and PICKFORD, J., says in the course of his judgment that the conditions must be reasonable. No doubt they must, and counsel for the respondent does not dispute it.

The question, therefore, is: Is this a reasonable condition, having regard to the subject-matter of the Act? One has to look not only at the terms of the condition, but one is entitled to look at the contention by the respondent before the justices, when it was said that this was a reasonable condition having regard to the health and the well-being of young children in the borough of Halifax. Again, counsel for the respondent has conceded that the condition in question must be reasonable having regard to the use of the licensed premises, or it must be a reasonable condition having regard to the subject-matter of the licence, and if this condition was reasonable having regard to the subject-matter of the licence, which was the use of these premises for cinematograph exhibitions, it would be very difficult for us to say that it was in excess of the power of the licensing authority; I quite agree that one ought to be slow to fetter a power vested in a local authority by the express terms of a statute. But when one comes to consider the ground on which this is

said to be a reasonable condition, it seems to me reasonably clear that the licensing authority has imposed this condition not because the cinematograph exhibition of itself requires, for the safety and condition of the children, that they should be controlled by the condition, but that the condition is reasonable, if reasonable at all, not because of anything connected with cinematograph exhibitions, but because it is desirable for the health and well-being of small children that they should not be in any place of entertainment after certain hours, and certainly not be there unless accompanied by a parent or guardian. That is the only ground on which, it seems to me, it can be said to be reasonable. Is there any ground for imposing that condition in the giving of the licence? I am of opinion that there is no connection at all, though it may be highly desirable that young children should not be in places of public entertainment after certain hours. It is as true of other places of entertainment as of this, and I can see no connection between the cinematograph exhibitions, which alone the licensing authority ought to have considered when they imposed it, and the condition which relates to the age of children.

That being so, I must come to the conclusion that this condition was not intra vires of the licensing authority, and that the conviction ought to be quashed.

ROWLATT, J.—I am of the same opinion. The appellants were convicted under s. 3 of the Cinematograph Act, 1909, of allowing their premises to be used in contravention of a condition of restriction on or subject to which the licence has been granted, and they say that the condition was not a valid one, not within the competence of the council to impose, and not reasonable. In order to see what conditions may be imposed by the licensing authority, it is necessary to look at the Act. By s. 2, power is given to grant licences to such persons as the county council think fit to use the premises specified in the licence for the purpose of a cinematograph on such terms and conditions and under such restrictions as, subject to the regulations of the Secretary of State, the council may determine. [HIS LORDSHIP read s. 3, and continued:] When s. 3 says, "if the occupier . . . allows those premises to be used," it is clearly referring to a user on behalf of the occupier by himself or by his subordinates. It does not mean used from the point of view of one of the public who may come in to enjoy the entertainment afforded there; and when the statute speaks of restrictions or conditions which must not be contravened in the user, it is, to my way of thinking, dealing with conditions and restrictions which affect the user of the premises by the licensee. Under the circumstances, one can at once think of a great many restrictions and conditions which might be imposed on the user of the premises by the licensee. It has been held that we are not confined to restrictions or conditions in the interests of safety from fire, or, indeed, safety at all. There are many others; there is public decency and there is public order, and the protection of persons employed. These considerations would bring in time and periods of opening—an indefinite list of restrictions, it might be imagined, that might be imposed with regard to the opening of an establishment of this kind. But this seems to me to be travelling into an entirely different region. It is only nominally a condition affecting the user of the place by the management of it. It is really affecting the user of it by a section of the public. It is not saying that no children shall enter and limiting the theatre to adults. I do not say whether that would be right or wrong, but it is accepting the position that children of any age may come in accompanied or unaccompanied by grown-up people up to nine o'clock, but after nine o'clock no child shall be there at all if under ten years of age, and if over ten and under fourteen he must be accompanied by a parent or guardian. It is obvious, looking at it apart from what appears in the Case, that the licensing authority here was addressing itself to a social question entirely independent of the management of this place as a picture theatre, a very broad and important question on which one may have strong opinions; and if the council could enter into it, one would not say that the conclusion that they had come to was unreasonable if they are the judges whether children under ten years of age should go to cinemas after nine o'clock. If they

are the judges of that, it is very difficult to say that they were unreasonable. But it seems to me that, under this Act, they are not the judges of that question of public policy.

We were pressed, during the argument on behalf of the respondent, that justices have, in the exercise of their powers of granting off-licences, a right to say: "We will not give this off-licence except upon the terms of an undertaking that the premises are not open until eleven o'clock, because we want to keep out women." They are entitled to say that, but it seems to me that the subject-matter is entirely different when you grant an authority power to limit the consumption of liquor in people's own homes; you do ipso facto clothe them with an authority of that sort. I think that is a different class of case. There is one other reason which was not noticed in argument. I suppose the condition refers to the premises when used under this licence. If it is wider than that, it must be bad, because the owner of premises like this is not bound to use them for a cinema. He can use them for a concert or for a Scripture lecture, and to say that the condition should then apply and that children should not be on the premises except under this condition would, of course, be hopelessly bad. I agree that the appeal must be allowed.

ATKIN, J.—I have considerable doubt in this case, because I can see that the contention of the respondent does give power to a public authority to interfere very seriously with what is now, no doubt, a very substantial public industry. But at the same time I myself perceive an insuperable difficulty in seeing what limitation you can impose on the powers given to the public authority under the terms of s. 2 of the Cinematograph Act, 1909. The terms of s. 2 are quite unrestricted. [His Lordship read sub-s. (1), and continued:] It is to be noticed that these powers are given in the first instance to a large representative body, the county council, and it is provided by s. 5 that the council may delegate its powers to committees of the council or to district councils, with or without any restrictions or conditions, as they think fit.

The question as to the limitation of these powers arose soon after the Act was passed, in 1910, in the *Bermondsey Case* (1), and in that case the contention on behalf of the company was that the powers of the county council were limited to making such regulations as were necessary for the safety of the premises. That contention was negatived by the court in terms. The powers of the county council are not limited to making regulations for the purpose of public safety. In order to arrive at that result, the court appears to me to have laid down what the powers were. Lord Alverstone, C.J., says this ([1911] 1 K.B. at p. 451):

> "The language of s. 2 (1) seems to me to be quite clear, and we must therefore construe it according to its plain meaning. In my opinion that section is intended to confer on the county council a discretion as to the conditions which they will impose, so long as those conditions are not unreasonable."

And Pickford, J., says (ibid. at p. 453):

> "If that enactment stood alone, I do not see how it could be denied that, subject to the regulations of the Secretary of State, the county council might impose such conditions, so long as they were not unreasonable, as they thought fit."

He goes on to say that it does not stand alone, because of the power which appears to limit it as to public safety, and then he proceeds as follows:

> "I do not think that that argument is sound. Section 1 expressly limits the power of the Secretary of State to make regulations 'for securing safety,' whereas there is no such limitation imposed upon the power of the county council under s. 2. It may well be that the Legislature thought that, in addition to regulations which are specially directed to securing safety, it would

be a further means of securing safety to give to the county council a free power to impose such terms, conditions, and restrictions as they thought right."

It appears to me that the Divisional Court in that case did adopt the larger view of the powers of the county council that are contended for by the respondent in this case and that we are bound by that decision. It is not that that court lays down the power without any restrictions at all, because it provides that the regulations should be reasonable, and it was contended by the respondent, and, in my view, it was right, that there should be at any rate these limitations on the exercise of the powers of the county council—namely, that they should be reasonable and must be regulations and restrictions in relation to the exercise of the powers granted under the licence, and they must be regulations devised in relation to the public interest. If those three conditions are complied with, it appears to me that there is no other fetter on the discretion given to the licensing authority. I have felt the greatest difficulty in seeing what limitations you can impose if they fall short of those that I have mentioned; and I, for my part, see the greatest difficulty in saying that you may close the cinematograph entertainment to the public at eleven o'clock unless that is justified on the principles of the general interest of the public. The power is not exercised by them because they think that the entertainment would be more disorderly in the house if it went on till twelve o'clock than if it closed at eleven, but because it is in the public interest generally that entertainments should come to an end at eleven o'clock. For many reasons that may occur to one, they have power to say that it shall not begin till two o'clock in the afternoon. I imagine that they are entitled to say that, because they are entitled to say that they do not think that it is in the interest of the public at large that there should be entertainments of this kind in the morning, just as it is open to the licensing justices to say that the sale of drink shall not take place before a particular hour in the morning. I think that they are entitled to fix their hours in relation to the public interest, and, if they take into account the interest of a very substantial section of the public, they are entitled to do so.

I think, therefore, that they are entitled, in the exercise of those powers, to take into account the public interest so far as children are affected, and it appears to me that they are justified in saying that, for this class of entertainment, children shall not be present at all after nine o'clock unless they are attended by a parent or guardian who can form a decision as to the nature of the entertainment and prevent the child from roaming at large if it wishes to do so, or from coming into contact with persons who are undesirable. It appears to me that this provision, which cannot be said to be unreasonable under the circumstances, is one which is within the scope of the licensing authority, and, therefore, my own opinion is that this conviction was proper. But my brothers think otherwise, and the appeal must be allowed.

Appeal allowed. Conviction quashed.

Solicitors: *Nicholls, Herbert & Co.*, for *Arthur Willey*, Leeds; *Sharpe, Pritchard & Co.*, for *Percy Saunders*, Halifax.

[*Reported by* J. A. SLATER, ESQ., *Barrister-at-Law.*]

A

PERKINS *v.* JEFFERY

[KING'S BENCH DIVISION (Lord Reading, C.J., Avory and Sankey, JJ.), April 30, May 14, 1915]

[Reported [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 31 T.L.R. 444; 25 Cox, C.C. 59] B

Criminal Law—Evidence—Cross-examination of prisoner as to character—Cross-examination as to previous offences—Evidence of commission of other offences—Rebuttal of defence of mistake or accident.

The respondent was charged under s. 4 of the Vagrancy Act, 1824, with having, on July 16, 1914, unlawfully and wilfully exposed his person to a young woman in Small Heath Park, a place of public resort, with intent to insult her. On the complainant identifying him as the man who had so acted, he replied: "I think you have made a mistake," to which she replied that she had not; and in her evidence the complainant stated that she had seen the respondent about two months before. The respondent gave evidence on his own behalf, putting his character in issue, and in cross-examination he was asked the question: "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?", and he replied: "I do deny it." The justices ruled that the question was inadmissible and ought not to have been put, on the ground that it was not relevant to the issue they had to determine and was contrary to s. 1 of the Criminal Evidence Act, 1898. To rebut the respondent's denial, it was proposed to recall the complainant to prove that the respondent had been guilty of the same conduct to her at the same place and hour on the previous May 16, and also to call witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. The justices refused to hear this evidence. C D E F

Held: the question put to the respondent in cross-examination, and the evidence of the complainant tendered to rebut his denial, and directed to show that he had been guilty of the same conduct to her at the same place and the same hour on a day two months previously, were admissible and relevant to each of the issues (i) that the complainant was not mistaken in her identification of the respondent, (ii) that the act of the respondent was done wilfully and not accidentally, and (iii) that it was done with intent to insult her; but the evidence tendered tending to show similar acts on other occasions ought not to be admitted unless and until the defence of accident or mistake, or absence of intention to insult, was definitely put forward, and the other occasions were sufficiently proximate to the alleged offence to show a systematic course of conduct. G H

Notes. Considered: *R.* v. *Armstrong*, [1922] All E.R.Rep. 153; *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044. Referred: *R.* v. *Smith*, post, p. 262; *R.* v. *Thompson*, [1917] 2 K.B. 630; *R.* v. *Porter* (1935), 25 Cr. App. Rep. 59; *R.* v. *Straffen*, [1952] 2 All E.R. 657.

As to evidence in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 436 et seq.; and for cases see 14 DIGEST (Repl.) 401 et seq. I

Cases referred to:

(1) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

(2) *R.* v. *Ollis*, [1900] 2 Q.B. 758; 69 L.J.Q.B. 918; 83 L.T. 251; 64 J.P. 518; 49 W.R. 76; 16 T.L.R. 477; 44 Sol. Jo. 593; 19 Cox, C.C. 554, C.C.R.; 14 Digest (Repl.) 422, *4104*.

(3) *R.* v. *Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 54 W.R. 586; 22 T.L.R. 633; 50 Sol. Jo. 542; 21 Cox, C.C. 252, C.C.R.; 14 Digest (Repl.) 420, *4091*.

(4) *R.* v. *Boyle and Merchant*, post, [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180; sub nom. *R.* v. *Boyle*, *R.* v. *Merchant*, 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673, C.C.A.; 14 Digest 437, *4237*.

(5) *R.* v. *Christie*, [1914] A.C. 545; sub nom. *D.P.P.* v. *Christie*, ante, p. 63; 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141, H.L.; 14 Digest (Repl.) 405, *3962*.

Also referred to in argument:

R. v. *Ball*, *R.* v. *Ball*, [1911] A.C. 47; 75 J.P. 180; sub nom. *D.P.P.* v. *Ball* (*No. 2*), 80 L.J.K.B. 691; 103 L.T. 738; 55 Sol. Jo. 139; 22 Cox, C.C. 366; 6 Cr. App. Rep. 31, H.L.; 14 Digest (Repl.) 426, *4138*.

R. v. *Shellaker*, [1914] 1 K.B. 414; 83 L.J.K.B. 413; 110 L.T. 351; 78 J.P. 159; 30 T.L.R. 194; 24 Cox, C.C. 86; 9 Cr. App. Rep. 240, C.C.A.; 14 Digest (Repl.) 432, *4191*.

R. v. *Francis* (1874), L.R. 2 C.C.R. 128; 43 L.J.M.C. 97; 30 L.T. 503; 38 J.P. 469; 22 W.R. 663; 12 Cox, C.C. 612, C.C.R.; 14 Digest (Repl.) 437, *4244*.

R. v. *Wyatt*, [1904] 1 K.B. 188; 73 L.J.K.B. 15; 68 J.P. 31; 52 W.R. 285; 20 T.L.R. 68; 48 Sol. Jo. 85; 20 Cox, C.C. 462, C.C.R.; 14 Digest (Repl.) 439, *4258*.

R. v. *Rodley*, [1913] 3 K.B. 468; 82 L.J.K.B. 1070; 109 L.T. 476; 77 J.P. 465; 29 T.L.R. 700; 58 Sol. Jo. 51; 23 Cox, C.C. 574; 9 Cr. App. Rep. 69, C.C.A.; 14 Digest (Repl.) 422, *4109*.

Case Stated by justices for the city of Birmingham.

At a court of summary jurisdiction sitting at Birmingham on July 21, 1914, the appellant, George Perkins, preferred a charge against the respondent, Clarence Jeffrey, under s. 4 of the Vagrancy Act, 1824, of having, on July 16, unlawfully, wilfully, openly, lewdly, and obscenely exposed his person in a certain place of public resort, to wit, Small Heath Park, Birmingham, with intent then and there to insult a certain female named Kathleen Turnor. On the hearing of the charge Kathleen Turnor was called as a witness for the prosecution. Among other statements in her evidence she said that, on July 16, 1914, she was boating on the pool in Small Heath Park by herself; she saw the respondent at the edge of the pool and he exposed his private parts to her. She complained to the boatman, John Taylor, who went to the respondent and said "Is this the man?" She replied that it was, and the respondent said, "I think you have made a mistake there." She replied, "I have not." She further said that she had seen the respondent in the early part of May, 1914. On this statement she was not cross-examined. John Taylor, another witness for the prosecution, among other statements in his evidence, said: "I have seen [the respondent] by the pool several times during May." When arrested by the appellant, the respondent said: "They have made a mistake; they have got the wrong man." The respondent gave evidence on oath on his own behalf. In cross-examination, among other statements, he said: "I do not remember seeing her [Kathleen Turnor] in first or second week in May, 1914." He was then asked, also in cross-examination: "Do you deny exposing yourself to the same young lady in Small Heath Park in the first or second week in May last?" The respondent replied: "I do deny it," but, acting under advice, the justices ruled that this question should not have been put, on the grounds that it was not relevant to the issue they had to determine on the charge before them, and was contrary to the provisions of s. 1 of the Criminal Evidence Act, 1898. The appellant's solicitor also intimated that to rebut the respondent's denial, as stated above, he desired to recall Kathleen Turnor to prove that the respondent had been guilty of the same conduct to her at the same place and at the same hour on May 16, 1914,

and also that he desired to call other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with intent to insult females on other occasions at the same place and about the same hour. Acting on the advice given to them, the justices refused to hear such evidence on the charge preferred before them.

The justices determined and found as a fact that there was not sufficient evidence given by or on behalf of the appellant to satisfy them that the respondent was guilty of the offence charged, and they therefore discharged him. If they were wrong in refusing to admit the question put to the respondent in cross-examination, or the evidence proposed to be given in rebuttal, they asked that the case should be remitted to them for rehearing. If they were right in their refusal, then their decision was to stand.

Norman Birkett for the appellant.
C. Doughty for the respondent.

Cur. adv. vult.

May 14, 1915. **AVORY, J.,** read the following judgment of the court.—The respondent was charged, under s. 4 of the Vagrancy Act, 1824, with having exposed his person in a place of public resort with intent to insult a female named Kathleen Turnor.

The questions submitted to this court on the Special Case Stated by the justices are: First, whether the respondent, giving evidence on his own behalf, could be asked in cross-examination if he had exposed himself to the same young woman at the same place in the month of May, 1914; secondly, whether evidence was admissible on the part of the complainant that he had so exposed himself in the month of May; and, thirdly, whether evidence was admissible on the part of the complainant that the respondent had on other occasions indecently exposed himself with intent to insult females at the same place and about the same hour. The justices refused to admit the question in cross-examination, or the other evidence, on the ground that it was not relevant to the issue, and was contrary to the provisions of the Criminal Evidence Act, 1898. With regard to the question in cross-examination, it appears now, by the notes of the evidence which have been supplied on the re-statement of the Case, that the respondent giving evidence-in-chief put his character in issue, and the question, therefore, might have been admitted on that ground alone; but, in view of a rehearing of the Case, it is necessary to consider whether this and the other evidence tendered was admissible as being relevant to the issue.

The Criminal Evidence Act, 1898, does not exclude any question in cross-examination which may tend to criminate the accused of the offence charged, nor any evidence which is admissible to show that he is guilty of the offence charged. On the hearing of the charge in the present case, the complainant had to prove, first, that the respondent had exposed himself; secondly, that he had done so wilfully and not accidentally; and, thirdly, that he had done it with intent to insult her. In our opinion, the question in cross-examination and the evidence of the complainant directed to show that he had done the same thing at the same place and to the same woman were admissible and relevant to each of these issues for the purpose of showing that she was not mistaken in her identification; that it was done wilfully and not accidentally; and that it was done with intent to insult her. The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to any issue before the court: see *Makin* v. *A.-G. for New South Wales* (1) ([1894] A.C. at p. 65), and *R.* v. *Ollis* (2), and the judgment of CHANNELL, J. ([1900] 2 Q.B. at p. 781). It is suggested that the defence raised in this case was one of identity, and that this was the only issue before the court; but, in our opinion, the statement of the respondent when arrested, "They have made a mistake, they have got the wrong man," would not preclude him from raising the other defences that the act was

not wilful and not done with intent to insult the complainant; and it must be borne in mind that, in criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up. In the present case, we think the cross-examination did suggest a possible defence on the ground that the act was not wilful or with intent to insult a female.

With regard to the evidence tendered of other witnesses to show that the respondent had been guilty of a systematic course of conduct by indecently exposing himself with the intent to insult females on other occasions at the same place and about the same hour, the question is more difficult. The dates of the other occasions are not before the court, and, unless it appeared clearly that the defence that the act was done wilfully or with intent to insult a female was going to be relied on, and that the other occasions were sufficiently approximate to the alleged offence to show a systematic course of conduct, we think the evidence should not be admitted. *R.* v. *Bond* (3), and particularly the judgment of BRAY, J. ([1906] 2 K.B. at p. 418), is an authority which would justify the admission of such evidence: see also STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (8th Edn.), art. 12:

> "When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant."

But it is, we think, open to doubt whether evidence is admissible to prove a "system or course of conduct," unless it is relevant to negative accident or mistake, or to prove a particular intention: see the judgment of LORD READING, C.J., in *R.* v. *Boyle and Merchant* (4) ([1914] 3 K.B. at p. 347), where he said this:

> "We think that the ground upon which such evidence is admissible is that it is relevant to the question of the real intent of the accused in doing the acts. Its object is to negative such a defence as mistake, or accident, or absence of criminal intent, and to prove the guilty mind which is the necessary ingredient of the offence charged. There is, as is apparent from a consideration of the authorities, an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction the subject-matter of the charge then being investigated, which evidence is admissible. It has been laid down that there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible."

Having regard to what was said in the House of Lords in *D.P.P.* v. *Christie* (5), as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury out of proportion to its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or absence of intention to insult, is definitely put forward.

The Case will be remitted to the justices for re-hearing with this opinion of the court.

Solicitors: *Capron & Co.*, for *J. E. Hill*, Birmingham; *Judge & Priestley*, for *Philip Baker & Co.*, Birmingham.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

BRITISH DOMINIONS GENERAL INSURANCE CO., LTD. *v.* DUDER AND OTHERS

[Court of Appeal (Buckley, Pickford and Bankes, L.JJ.), March 16, 17, 30, 1915]

[Reported [1915] 2 K.B. 394; 84 L.J.K.B. 1401; 113 L.T. 210; 31 T.L.R. 361; 13 Asp.M.L.C. 84; 20 Com. Cas. 270]

Insurance—Reinsurance—Compromise between insured and insurers of original policy—Right of reinsurers to benefit of compromise—Insurers entitled only to indemnity for amount paid by them under compromise, plus proportion of expenses of obtaining it.

The plaintiffs insured the *K.*, valued at £20,500, to the extent of £1,500 against total and/or constructive total loss only, and reinsured the risk with the defendants. The reinsurance policy did not contain the clause "to pay as may be paid thereon." During the currency of the policies, the *K.* stranded. Her owner gave notice of abandonment and alleged that she was a constructive total loss. The plaintiffs refused to accept the notice of abandonment and the owner brought an action against them which was compromised by the plaintiffs paying the owner 66 per cent. of the loss. The reinsurers were asked to agree to this compromise, but refused on the ground that there was no constructive total loss in fact. In an action by the plaintiffs against the reinsurers under the reinsurance policy, it was found that there was a constructive total loss in fact and that the reinsurers were liable to the plaintiffs for the full amount of the reinsurance subject to the benefit of any rights they might have had in respect of the abandonment of the *K.* if no compromise had been effected. On appeal,

Held: a contract of reinsurance was a contract of indemnity only and the reinsurers were entitled to the benefit of the compromise made by the plaintiffs with the owner; therefore, the plaintiffs could only recover from the reinsurers 66 per cent. of the loss though they were entitled to add to that claim a proper proportion of the expense of obtaining the compromise.

Uzielli v. *Boston Marine Insurance Co.* (1) (1884), 15 Q.B.D. 11, discussed.

Judgment of Bailhache, J., [1914] 3 K.B. 835, reversed.

Notes. Distinguished: *British Union and National Insurance Co.* v. *Rawson*, [1916] 2 Ch. 476. Considered: *Firemen's Fund Insurance Co.* v. *Western Australian Insurance Co. and Atlantic Insurance Co.*, [1927] All E.R.Rep. 514; *Versicherungs Und Transport A.G. Daugava* v. *Henderson*, *Versicherungs Und Transport A.G. Daugava* v. Campbell (1934), 39 Com. Cas. 154. Referred to: *Norwich Union Fire Insurance Society* v. *Colonial Mutual Fire Insurance Co.*, [1922] All E.R.Rep. 513.

As to who can avail himself under a marine policy, see 22 Halsbury's Laws (3rd Edn.) 95 et seq.; and for cases see 29 Digest 117 et seq.

Cases referred to:

(1) *Uzielli* v. *Boston Marine Insurance Co.* (1884), 15 Q.B.D. 11; 54 L.J.Q.B. 142; 52 L.T. 787; 33 W.R. 293; 1 T.L.R. 49; 5 Asp.M.L.C. 405, C.A.; 29 Digest 117, *712*.

(2) *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest 52, *156*.

(3) *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333; 51 L.J.Q.B. 548; 47 L.T. 277; 31 W.R. 65; 4 Asp.M.L.C. 576, H.L.; 29 Digest 291, *2375*.

(4) *Re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.*, [1892] 2 Ch. 423; 61 L.J.Ch. 362; 66 L.T. 370; 40 W.R. 441; 8 T.L.R. 393; 36 Sol. Jo. 308; 7 Asp.M.L.C. 107; 29 Digest 117, *712*.

(5) *Re Law Guarantee Trust Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, post; [1914] 2 Ch. 617; 84 L.J.Ch. 1; 111 L.T. 817; 30 T.L.R. 616; 58 Sol. Jo. 704, C.A.; 26 Digest (Repl.) 11, *13*.

(6) *Nelson* v. *Empress Assurance Corpn., Ltd.*, [1905] 2 K.B. 281; 74 L.J.K.B. 699; 93 L.T. 62; 53 W.R. 648; 21 T.L.R. 555; 10 Asp.M.L.C. 68; 10 Com. Cas. 237, C.A.; 29 Digest 48, *105.*

(7) *Mackenzie* v. *Whitworth* (1875), 1 Ex.D. 36; 45 L.J.Q.B. 233; 33 L.T. 655; 24 W.R. 287; 3 Asp.M.L.C. 81, C.A.; 29 Digest 93, *506.*

(8) *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K.B. 376; 72 L.J.K.B. 195; 80 L.T. 362; 9 Asp.M.L.C. 390; 8 Com. Cas. 108; 29 Digest 120, *731.*

Also referred to in argument:

Chippendale v. *Holt* (1895), 65 L.J.Q.B. 104; 73 L.T. 472; 44 W.R. 128; 12 T.L.R. 50; 40 Sol. Jo. 99; 8 Asp.M.L.C. 78; 1 Com. Cas. 197; 29 Digest 118, *719.*

Appeal by the defendants from a judgment of BAILHACHE, J.

The facts are set out in the judgment of BUCKLEY, L.J.

Maurice Hill, K.C., and *F. D. MacKinnon, K.C.*, for the defendants.

Adair Roche, K.C., and *R. A. Wright* for the plaintiffs.

Cur. adv. vult.

March 30, 1915. The following judgments were read.

BUCKLEY, L.J.—On Dec. 31, 1912, the plaintiffs were original underwriters to the extent of £1,500, on the hull and machinery of the steamship *Katina* valued at £20,500. On Jan. 23, 1913, the plaintiffs, by two policies of that date, the one for £850 and the other for £650 reinsured against the risk of total and/or constructive total loss only of her hull and machinery £20,500 or v.o.p., or (that is) value as in original policy. The ship stranded on May 23, 1913, off Hartland Point, and three days later the owners gave notice of abandonment. The plaintiffs contended that the ship was not a constructive total loss. The owners brought an action against the plaintiffs, and in the result, that action was compromised as between those parties on the terms that the plaintiffs paid the owners 66 per cent. of liability on the footing of a constructive total loss. The defendants were invited to come into that compromise, but declined to do so. They said that the plaintiffs must act as uninsured, and that they, the defendants, did not admit that the ship was a constructive total loss. On Feb. 12, 1914, the plaintiffs, by their solicitors, wrote to the defendants a letter in the plainest terms to the effect that they had satisfied themselves that the vessel was in fact a constructive total loss, and that a settlement at 66 per cent. was very beneficial to the underwriters; and asking the defendants to come into the compromise, and stating that, if they did not do so, the plaintiffs would then prosecute their action against the defendants, claiming a constructive total loss on the reinsurance policies strictly in accordance with their full rights on the policies, which, they said, entitled them to claim 100 per cent. on establishing in fact that there was a constructive total loss. The defendants adhered to the position which they had taken up, and refused to admit that the vessel was a constructive total loss. Thereupon the plaintiffs paid the 66 per cent., and now sue the defendants on the reinsurance policies.

In this action they have proved that there was in fact a constructive total loss; and on that there is now no dispute. The question is whether the plaintiffs are entitled to 100 per cent. or 66 per cent. against the defendants. The learned judge has decided this in favour of the plaintiffs, holding that they are entitled to recover 100 per cent. The question is whether this is right. On the one side it is said that a contract of reinsurance is a contract of indemnity, and that it is a contract of indemnity only; that the plaintiffs have in fact only had to pay 66 per cent. and cannot recover more against the defendants. On the other side it is contended that the defendants were offered an opportunity of coming into the compromise; that they refused to do so, alleging that they were liable for nothing, because (as they contended) there was not a constructive total loss;

whereupon (it is contended) they cannot now have the benefit of the compromise, which was obtained not in any way for them, but as a compromise of the question of constructive total loss, which has now been determined against them.

A contract of insurance and a contract of reinsurance are independent of each other. But a contract of reinsurance is a contract which insures the thing originally insured—namely, the ship. The reinsurer has an insurable interest in the ship by virtue of his original contract of insurance. The thing insured, however, is the ship, and not the interest of the reinsurer in the ship by reason of his contract of insurance upon the ship. In *Uzielli* v. *Boston Marine Insurance Co.* (1), a case I find it very difficult to understand, the Court of Appeal affirmed that, by reason of the total loss which had occurred, the original underwriter was entitled to recover from the reinsuring underwriter up to £1,000, being 100 per cent. on the amount named in the policy of reinsurance, notwithstanding that the original underwriter had settled with the owners for 88 per cent. The judgment of BRETT, M.R., goes to, first, a decision that no more than the £1,000 could be recovered, because, although the reinsurers had an insurable interest exceeding their share in the value of the ship by reason of the sue and labour clause, yet the policy of reinsurance was only for £1,000, and they could recover no more; and, secondly, that the sue and labour clause was not available for the benefit of the reinsurers. He left the first point at a stage at which he seems to have assumed that up to the £1,000 the reinsurers could recover without saying why; and then on the second point he went on to hold that they could not recover more. I cannot find that he gives any reason why the difference between the 88 per cent. and the 100 per cent. could be recovered. COTTON, L.J., says it is true: "They are liable to this extent"—that is, £1,000—"by reason of the total loss which has occurred"; but I cannot find any reasoning which leads to this conclusion. His reasoning seems to be only a summary of that of the Master of the Rolls. LINDLEY, L.J.'s judgment is rested on "pay as may be paid thereon." I cannot think that this case is an authority for the proposition that, on a contract of reinsurance there can be recovered more than an indemnity—that the reinsurer can make a profit out of the reinsurance. In *Castellain* v. *Preston* (2) I find a principle laid down in the following passages:

> "The contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified": per BRETT, L.J., 11 Q.B.D. at p. 386.

> "If there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is": per COTTON, L.J., ibid. at p. 395.

> "Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind": per BOWEN, L.J., ibid. at p. 397.

In *Burnand* v. *Rodocanachi* (3) I find LORD BLACKBURN saying (7 App. Cas. at p. 339):

> "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes

the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

In these passages I find a principle stated. The use of all authorities is to ascertain from them the legal principles which they affirm. In *Uzielli* v. *Boston Marine Insurance Co.* (1), having read the case more than once, I cannot find a principle. I must guide myself, therefore, by *Castellain* v. *Preston* (2) rather than by *Uzielli* v. *Boston Marine Insurance Co.* (1). BAILHACHE, J., rested his judgment on the proposition that the indemnity afforded by reinsurance is against liability, and not against discharge of liability. I am not able to assent to this proposition, if it means, as by the context it must have meant, that, if the liability be discharged by payment of a less amount, the assured by reinsurance can recover against the reinsuring underwriter the amount of the liability, although exceeding the amount paid for its discharge. There are cases such as *Re Eddystone Marine Insurance Co.* (4) and *Re the Law Guarantee Trust Society, Ltd.* (5), in which it would seem, until they are further considered, that the assured by way of reinsurance is recovering more than the amount he has to pay on the original insurance. They are cases, however, in which the assured by way of bankruptcy or liquidation seems to discharge his liability by payment of a dividend to the original assured. This, however, is not the fact. Notwithstanding the payment of a dividend, the liability to the full extent remains; and out of further assets, if any, it must in law be discharged. When the estate pays only 10s. in the pound, and recovers 20s. in the pound, it is not recovering in excess of a sum for which it has compromised its liability. The liability is not compromised at less than 20s. in the pound. The liability is still 20s. in the pound, and the right to recover a like sum against the reinsuring underwriter is an asset of the estate; and its proceeds must go according to the law of bankruptcy or liquidation to all the creditors in administration.

I regret to have to come to the conclusion that the defendants, who would have nothing to do with the compromise, are, nevertheless, entitled to the benefit of it. But it seems to me that, as matter of legal right, the plaintiffs cannot, even in such a state of facts as this, make a profit out of the reinsurance. For these reasons I think that the appeal must be allowed. The plaintiffs are, however, entitled to indemnity, and this is not necessarily confined to the 66 per cent. They are entitled to such further sum, if any, as is required to give them an indemnity. The costs, for instance, of obtaining the compromise at 66 per cent. should be added to the 66 per cent. I shall be prepared to hear anything that may be said as to the proper terms of an inquiry to ascertain what such further sum should be.

PICKFORD, L.J., stated the facts, and continued: The question of constructive total loss was decided against the defendants by BAILHACHE, J., and they accept that part of his decision, but they appeal against so much of it as decides that they are liable to pay 100 per cent. of the loss. There is no direct authority on the subject, and the question does not often arise, because the reinsurers generally join in the compromise; but in this case they decided to try to escape liability altogether, on the ground of there being no constructive total loss, and if they failed on that ground, to claim the benefit of the compromise in which they refused to join. BAILHACHE, J., has decided that they cannot claim this benefit, and the question is whether this conclusion is in accordance with the principles of marine insurance.

A contract of marine insurance is a contract of indemnity, and a contract of reinsurance is also a contract of indemnity, though it is a contract independent of the original contract of insurance, and so not within the third party rules

relating to indemnity decided in *Nelson* v. *Empress Assurance Corpn., Ltd.* (6). BAILHACHE, J., accepts the principle that a contract of reinsurance is a contract of indemnity; but he says that it is a contract of indemnity against liability, and that he sees no more reason why a reinsurer should pay less by reason of a compromise made with the assured for the benefit of the original assured and not of the reinsurer, than in the case where the original underwriter becomes bankrupt and pays a small dividend or none. The reference in these last words is to *Re Eddystone Marine Insurance Co.* (4), and *Re Law Guarantee Trust Society, Ltd.* (5). It does not seem to me that those cases stand at all on the same footing as this. They proceed on the ground that the reinsurer has to pay the original insurer his liability, whether he has discharged it or not, and that it is immaterial to him what the original insurer does with the money. But there is no diminution of the liability; the original insurer, though bankrupt, is still liable for the full amount; if assets were to come in in time he could be made to pay; and even in his insolvent state, if the creditor could get judgment, he could be made to pay this particular creditor, if it were not for the bankruptcy laws, which compel an equal distribution of his assets.

In the present case, there is an actual diminution of the liability; and the plaintiffs could never be called on to pay more than 66 per cent. *Uzielli* v. *Boston Marine Insurance Co.* (1) was also relied on by the plaintiffs. The case is very hard to understand, and does not decide the point in this case. The plaintiffs there had paid 88 per cent. for a total loss, and 24 per cent. for suing and labouring; and MATHEW, J., had given judgment against the defendants for 112 per cent. The Court of Appeal held that the suing and labouring clause did not apply to that reinsurance, and gave judgment for 100 per cent. The judgment of BRETT, M.R., does not, in my opinion, touch this point; that of LINDLEY, L.J., seems to me to proceed on the words "to pay as may be paid thereon," which are not in this policy; and the only difficulty is caused by the passage in the judgment of COTTON, L.J. (15 Q.B.D. at p. 18):

> "As to the second point, I agree that the policy is a contract of insurance upon the ship; it is a reinsurance upon the policy issued by the French Company to pay as they shall pay, but to cover a total loss only. The insurance is effected by those who are not owners, but by those who are liable in respect of the ship. What is the extent of the defendants' liability? The original insurers are liable in respect of the loss of the ship; but the defendants' liability on the policy is limited to the extent of £1,000, and that is all which they can be properly called upon to pay on the policy. They are liable to this extent by reason of the total loss which has occurred."

If this means that, on the happening of a total loss, the reinsurers are liable irrespective of whether the original underwriters are liable or not, it is, I think, inconsistent with the doctrine that they only indemnify the original insurers against their liability; and if it only means that they are liable to the extent of the original insurer's liability, it does not deal with the question whether a diminution of that liability enures for the benefit of the reinsurers. It is to be noticed that in that case, the original insurers had in fact paid more than the 100 per cent., and the court does not make it very clear why they gave judgment for more than 88 per cent. The judgment of COTTON, L.J., seems rather to treat the policy there as a valued policy, and it was contended before us that the policies in this case were valued policies, valuing the plaintiff's interest at £850 and £650, and that, therefore, as soon as a total loss happened, £850 and £650 immediately became payable. I do not think this is so. I think they are insurances of £850 and £650 on the plaintiffs' interest in a ship valued at a certain sum, not insurances on a valuation of the plaintiffs' interest. As the policies are in respect of total loss only on a valued ship, the effect under ordinary circumstances is the same as a valued policy, because the original insurer is liable for the whole amount or

none; but this does not seem to me to make them valued so as to exclude a consideration of the real amount of the plaintiffs' liability.

I think these policies are subject to the principles stated in *Castellain* v. *Preston* (2), where BRETT, M.R., says (11 Q.B.D. at p. 389):

> "I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and insurer by reason of the satisfaction of that right."

And BOWEN, L.J., says (ibid. at pp. 401, 402):

> "Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss he must account for the diminution to the underwriters";

and in *Burnand* v. *Rodocanachi* (3), per LORD BLACKBURN (7 App. Cas. at p. 339). It is true that these cases were not concerned with reinsurance, but the principle of indemnity applies to it as much as to original insurance. Here the plaintiffs have obtained a diminution of their liability by compromise, and it seems to me they come within the principles stated by BRETT, M.R., and BOWEN, L.J., in *Castellain* v. *Preston* (2), just as much as if some actual thing diminishing the loss had come into their hands, as mentioned by LORD BLACKBURN.

I think, therefore, that the plaintiffs are not entitled to recover 100 per cent., and that the defendants are entitled to the benefit of the compromise. I do not think it very material whether it be put on the ground that the plaintiffs' liability was reduced by agreement, and that they, therefore, never became liable for more than 66 per cent., or on the ground that their legal liability was 100 per cent., but by virtue of an agreement with the shipowners, they only paid 66 per cent., and that the reinsurers by subrogation became entitled to the benefit of that agreement. I do not, however, think that they are entitled to take the benefit and refuse to contribute to the expense of obtaining it. We were told that there were expenses incurred in obtaining the compromise, but were not told what they were. *Nelson* v. *Empress Assurance Corpn., Ltd.* (6) shows that they are not to be measured in the same way as costs of a third party under Ord. 16, r. 48; and, indeed, in this case it is not clear that the costs of the action brought against the plaintiffs by the shipowners were expenses of obtaining the compromise, as it seems that the plaintiffs might have secured the same terms without an action. There must, therefore, be an inquiry as to the expenses of obtaining the compromise, unless the parties come to an agreement about them.

BANKES, L.J.—The only question raised by this appeal is whether the plaintiffs are entitled to recover from the defendants the whole, or only a portion, of the amounts of two policies of reinsurance both dated Jan. 23, 1913. [HIS LORDSHIP stated the facts, and continued:] The plaintiffs' counsel complained bitterly of the conduct of the defendants in refusing to come into the compromise; and he pointed out that, as a result, not only had the plaintiffs to accept the compromise at their own risk, but they had to bring the present action at considerable cost to themselves in order to establish as against the defendants the facts that the vessel was a constructive total loss. It would be most unfair, he contended, that the defendants should be allowed any benefit where they had so unreasonably refused to shoulder any portion of the burden. From a business point of view I quite sympathise with the complaint, but I am unable to give it the legal

effect for which the plaintiffs contend, or which BAILHACHE, J., appears to some extent to have attributed to it.

In my opinion, it is not possible, without losing sight altogether of the root principle of insurance law that the contract of insurance is a contract of indemnity, to accept the plaintiffs' contention that they are entitled to ignore the compromise, and claim the full amount of the reinsurance policies. I find the rule laid down in very plain terms by LORD BLACKBURN in *Burnand* v. *Rodocanachi* (3). He says (7 App. Cas. at p. 339):

> "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

BAILHACHE, J., founds his judgment in the present case mainly on two considerations. First, that the plaintiffs bought the compromise, as he expressed it, and under the circumstances bought for their own advantage, and not for the joint benefit of themselves and of the defendants, and, consequently, that the defendants are not entitled to any benefit from it; secondly, that the contract of reinsurance is a contract of indemnity against liability, and not against discharge of liability. There is, no doubt, truth in both propositions, but, with respect to the learned judge, the propositions are only partially true. If the simile of a purchase is employed because a price was paid, it cannot, I think, be denied that it is a kind of purchase which does not put the purchaser into the shoes of the vendor so as to enable him to take advantage of the vendor's contract and to sue on it. In speaking of the contract of reinsurance as an indemnity against liability, and not against the discharge of liability, no account is taken of the fact that in the present case, before the liability was discharged, it was reduced in amount by agreement between the parties. In discussing the rights of these parties, I think that it is useful to consider what the position would be in a case where a reinsurer pays the original underwriter the full amount of his liability, and the latter, by some compromise with the original assured, afterwards reduces his liability to a less sum than he had received from his reinsurer. In such a case, on the authority of such cases as *Castellain* v. *Preston* (2), in my opinion, the reinsurer would be entitled by the doctrine of subrogation to be paid back the difference between what he had paid to the original underwriter and what the latter paid to his assured, and this because the contract of reinsurance is a contract of indemnity which, in the case referred to, can only be given effect to by invoking the aid of the doctrine of subrogation. In my opinion, unless there is something special in the present contract excluding the operation of the principle of indemnity, the same result must follow whether the compromise precedes or follows the payment by the reinsurer; and the conduct of the reinsurer, however unreasonable, with reference to the compromise, cannot, in my opinion, alter the character of the contract into which the parties originally entered.

It was contended for the plaintiffs that in the present case, the contract was a special one. It was said that the policy was a valued policy, and, there having been a constructional total loss of the vessel, the subject-matter of the insurance, the defendants must pay their agreed proportion of the agreed value of the vessel. I do not agree with this contention. It is true that, as between the defendants and the original assured, the value of the subject-matter of the insurance was agreed, and it is also true that as between the defendants and the plaintiffs, the latter had agreed to reinsure a certain proportion of the former's liability in respect of that agreed value; but that does not, in my opinion, in the events which

happened, exclude the principle of indemnity. The effect of the compromise may be variously stated. It may be said that, the claim of the original assured having been compromised, there was no payment by the original assured of any agreed fixed proportion of the agreed value. It may, perhaps, be said that the result of what happened was that a lower value was substituted for the one originally inserted in the policy, or that the original liability was reduced by agreement. Whatever view is taken of the compromise, the plaintiffs cannot, in my opinion, after the compromise, successfully contend that the reinsurance policies were valued policies in the sense that the plaintiffs' claim was "conclusively quantified," to use counsel for the plaintiffs' phrase, in the policies merely because it was established that the vessel, the value of which was agreed, was a constructive total loss. To use the language of LORD SELBORNE in *Burnand* v. *Rodocanachi* (3) (7 App. Cas. at p. 335), the law does not justify the use of the estoppel founded on the valuation for any such purpose.

No case was cited to us which, in my opinion, supported the plaintiffs' contention. *Mackenzie* v. *Whitworth* (7) was cited to us for the plaintiffs as supporting their contention. I do not so read that case. So far as it has any bearing on the question, I think that it tells against the plaintiffs. In that case, the question was whether in a policy which was really a policy of reinsurance, though not so expressed, the description of the subject-matter of the insurance was sufficient. The description was "on goods" merely, the goods being cotton shipped by a New Orleans firm of Tatman & Co., insured by New York underwriters and reinsured by them with the defendants. BLACKBURN, J., speaks of the interest of the original insurer in these words. He says (1 Ex.D. at p. 44):

> "The assured here had a direct interest in the safe arrival of the cotton. ... It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against."

It is plain, from what the learned judge said (ibid. at p. 42), that he was dealing with a case in which the original insurer had been called on to pay the full amount of the damage sustained, and the point which is raised in this appeal was not, therefore, before the court. The language of the learned judge is, in my opinion, important as indicating the nature of the interest of the plaintiffs, and the character of the contract of reinsurance.

Uzielli v. *Boston Marine Insurance Co.* (1) was referred to and relied on. It is generally accepted that this case on some points is very difficult of explanation. So far as it can be regarded as any authority in the present case, I think it is important to consider the arguments presented to the court. The underwriters, who were reinsured by the plaintiffs, compromised the claim of the original assured at 88 per cent, but a considerable sum had been expended in getting the vessel off. The plaintiffs thereupon, as stated in the report, became liable as reinsurers to pay their proportion of the 88 per cent., and a proportion of the expenses, less the proceeds of the sale, which sums altogether amounted to a loss of 112 per cent. MATHEW, J., held that there had been a constructive total loss, and that the underwriters had expended more than 100 per cent. in the efforts to save the vessel, and he gave judgment for the full 112 per cent., although the policy was a policy for £1,000 only. On the appeal the defendants contended that their liability ought to be limited to the 88 per cent., and that they ought not to be held liable under the sue and labour clause. The plaintiffs contended that, by the terms of the policy, the defendants were liable to pay what the plaintiffs were liable to pay under the sue and labour clause. The point which is taken in the present case was not taken in that case. On the contrary, it appears to

me to have been assumed that, but for the point under the sue and labour clause, the claim would have been limited to the 88 per cent. Brett, M.R., deals with the question in this way. He says that the interest of the plaintiffs as reinsurers is the loss which they might or would suffer under the policy on which they themselves were liable. He points out that this loss might be more than the share in the full value of the ship because of the liability under the sue and labour clause, and, though he holds that the claim must be limited to the amount of the policy—viz., £1,000—he apparently treats the 12 per cent., representing the difference between the 88 per cent. and the 100 per cent., as recoverable because of the position of the plaintiffs under the policy on which they were themselves liable, and the terms of the policy under which the plaintiffs were claiming from the defendants. I share the difficulty experienced by other judges more experienced in these matters than myself, in finding a satisfactory explanation of why the 12 per cent. was allowed: see per Bigham, J., in *Western Assurance Co. of Toronto* v. *Poole* (8) ([1903] 1 K.B. at pp. 386–388). But, on the other hand, I do not find any trace of the point which we have to decide in this appeal having been taken, or of any intention on the part of the court to decide it.

A third case that was relied on was *Nelson* v. *Empress Assurance Corpn., Ltd.* (6). That case turned on the question whether the third party procedure should be applied as between an original insurer and his reinsurer. The Court of Appeal decided that it ought not in the particular case before it, Mathew, L.J., observing that the attempt to apply the third party procedure was quite a novel departure which would lead to great inconvenience owing to the two contracts being independent contracts often covering different risks, and he said that he was not prepared to create a precedent. It is true that he said also that the contract of reinsurance could not be treated as a contract of indemnity within the meaning of Ord. 16, r. 48. It seems clear from what immediately follows this statement in the judgment, that the lord justice had not the present case in his mind when he made the statement; and even if the statement be accepted as correct in the narrow sense in which it was used, I do not think that it is any authority in support of the plaintiffs' contention. I need not refer in detail to *Re Law Guarantee Trust Society, Ltd., Liverpool Mortgage Insurance Co.'s Case* (5) which proceeded, in my opinion, on an entirely different principle, and I see no reason at all to suppose that Scrutton, J., had the point which we are considering in his mind when he used the language to which we have been referred ([1914] 2 Ch. at p. 650).

The conclusion to which I have come is that the present case is covered entirely by the principles laid down in the judgment in *Castellain* v. *Preston* (2) and that the present appeal should be allowed.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.; Thomas Cooper & Co.*

[*Reported by* W. C. Sandford, Esq., *Barrister-at-Law.*]

EMBIRICOS *v.* SYDNEY REID & CO.

[King's Bench Division (Scrutton, J.), March 30, 31, April 4, 1914]

[Reported [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 30 T.L.R. 451; 12 Asp.M.L.C. 513; 19 Com. Cas. 263]

Shipping—Charterparty—Exception clause—Restraint of princes—Right of charterers to refuse to carry out charterparty.

By a charterparty made between the plaintiff, the owner of a Greek steamer, and the defendants, as charterers, a steamer was chartered to sail from Leghorn to the Sea of Azof and load grain. The charterparty contained an exception of restraint of princes. The steamer arrived at her loading port on Oct. 1, 1912, and on the following day loaded part of her cargo. Loading was stopped by the defendants because, in view of the imminence of war breaking out between Turkey and Greece, the Turkish government was arresting and detaining all Greek vessels arriving at the Dardanelles. War was declared on Oct. 18, but from Oct. 16 to Oct. 24, the Turkish government unexpectedly allowed Greek ships to pass through the Dardanelles. The lay days under the charterparty expired on Oct. 22. On Oct. 21 the defendants purported to cancel the charter, but the plaintiff refused to accept the cancellation. The steamer was detained in the Black Sea until the end of the war. In an action by the plaintiff for damages for breach of the charterparty,

Held: at the time of the breach alleged, an excepted peril prevented the carrying out of the charter by the steamer proceeding on her voyage, and, as there was a likelihood that this restraint would continue so long as to defeat the object of the adventure, the defendants were justified in cancelling the charter, notwithstanding that the restraint was unexpectedly removed for a short period, and, therefore, there was no breach of the charter by the charterers.

Notes. Considered: *G. W. Grace & Co.* v. *General Steam Navigation Co.*, [1950] 1 All E.R. 201. Referred to: *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co., Admiral Shipping Co., Ltd.* v. *Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Anglo-Northern Trading Co., Ltd.* v. *Emlyn Jones and Williams*, [1917] 2 K.B. 78; *Countess of Warwick Steamship Co.* v. *Le Nickel Société Anonyme*, [1918] 1 K.B. 372; *Heilgers & Co.* v. *Cambrian Steam Navigation Co.* (1917), 33 T.L.R. 348; *Watts, Watts & Co., Ltd.* v. *Mitsui & Co., Ltd.*, [1916–17] All E.R.Rep. 501; *Bank Line, Ltd.* v. *Arthur Capel & Co.*, [1918–19] All E.R.Rep. 504; *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.* (1924), 29 Com. Cas. 284, *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency*, [1925] All E.R.Rep. 530; *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *Universal Cargo Carriers Corpn.* v. *Citati*; [1957] 2 All E.R. 70.

As to the frustration of a charterparty, see 30 Halsbury's Laws (2nd Edn.) 289–291; and for cases see 41 Digest 407 et seq.

Cases referred to:

(1) *Barrie* v. *Peruvian Corpn., Ltd.* (1896), 13 T.L.R. 101; 2 Com. Cas. 50; 41 Digest 408, *2537*.

(2) *Re Newman and Dale Steamship Co. and British and South American Steamship Co.*, [1903] 1 K.B. 262; 72 L.J.K.B. 110; 87 L.T. 614; 9 Asp.M.L.C. 351; 8 Com. Cas. 87; 41 Digest 408, *2538*.

(3) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, *2558*.

(4) *Nobel's Explosives Co.* v. *Jenkins & Co.*, [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp.M.L.C. 181; 1 Com. Cas. 436; 41 Digest 521, *3501*.

(5) *Jackson* v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 41 Digest 330, *1859*.

(6) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471*.

(7) *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp.M.L.C. 315; 2 Com. Cas. 238, H.L.; 29 Digest 47, *93*.

(8) *The Savona*, [1900] P. 252; 69 L.J.P. 95; 49 W.R. 303; 41 Digest 481, *3140*.

Action tried by SCRUTTON, J., in the Commercial Court.

The plaintiff claimed damages for breach of a charterparty. The facts are set out in the judgment.

Leck, *K.C.*, and *Raeburn* for the plaintiff, the shipowner.

Roche, *K.C.*, and *Mackinnon* for the defendants, the charterers.

Cur. adv. vult.

April 4, 1914. **SCRUTTON, J.,** read the following judgment. One Embiricos, the owner of the Greek steamer *Andriana*, sues Sydney Reid & Co., the charterers of that vessel, for £11,500 damages for failing to load a cargo in the steamer whereby she was detained in the Black Sea by the Græco-Turkish War, and a Turkish embargo in the Dardanelles preceding it. The charterers reply in substance that the war and embargo prevented the performance of the charter within any time in contemplation of the parties as reasonable. The facts were as follows: By a charterparty dated Sept. 11, 1912, the *Andriana* was to sail from Leghorn to Kertch and then to a loading place in the Sea of Azof as ordered and there load grain, ten working days to be allowed the charterers for bringing the cargo alongside, with liberty to detain the steamer on demurrage fifteen running days. Arrests and restraints of princes, rulers and peoples were excepted. Clause 10 of the charterparty ran thus:

> "If the nation under whose flag the steamer sails shall be at war, whereby the free navigation of the steamer is endangered, or in case of blockade or prohibition of export of grain and seed from the loading port, this contract shall be null and void at the last outward port of delivery or at any subsequent period when the difficulty may arise, previous to cargo being shipped."

The marginal clause ran thus:

> "Should the Dardanelles be closed on steamer's arrival with no immediate prospect of opening, this contract to be mutually cancelled."

The vessel passed through the Dardanelles into the Black Sea on Sept. 28, 1912, and on Sept. 30 and onwards, in view of the imminent probability of war, the Turkish Government arrested and detained all Greek vessels arriving at the Dardanelles. The *Andriana* arrived at her loading port, Temriuk, on Oct. 1, and on Oct. 2 received some cargo, 110 tons. On that day the loading stopped and on the same day the plaintiff telegraphed to the captain: "Owing to probable war you must not leave Azof before receiving my orders." On Oct. 7 the charterers wrote a letter to the captain of the steamer:

> "We beg to notify you that owing to subsequent events having occurred, steamer is not in a position to carry out charter, besides being uninsurable. Shippers meantime cannot continue loading, and decline responsibility."

War was declared between Turkey and Greece on Oct. 18, 1912. Meanwhile, on Oct. 16, the Turkish Government allowed Greek vessels laden to pass through the Dardanelles till Oct. 20, and then till Oct. 24. As the *Andriana*'s lay days did not expire till Oct. 22, up to which date the charterers could bring cargo alongside, and Temriuk was three to four days from Constantinople, the *Andriana*

could not have availed herself of this permission if the charterers had insisted on their rights under the charter to bring cargo up to and including Oct. 22. On Oct. 21 the charterers purported to cancel the charter, and the shipowner refused to accept the cancellation. Somewhat unexpectedly the Turkish Government allowed another seven days from Nov. 12 to 19 for Greek-laden vessels to pass the Dardanelles, and if the *Andriana* had been loaded in her lay days, or in her fifteen demurrage days, which expired on Nov. 6, she could have passed the Dardanelles then. There was, however, no reason to believe up to Oct. 16 that the Turkish Government would let Greek vessels pass through the Dardanelles, or, after Oct. 24 up to Nov. 11, that they would let them pass again. In fact, the *Andriana* was detained in the Black Sea till the close of the war. Her proposed cargo of grain was perishable, and would have been seriously injured by prolonged detention in a hold.

It was not really argued before me that either cl. 10 or the marginal clause excused the charterers. Clause 10 did not, for cargo had been shipped before the war. The marginal clause did not, for the Dardanelles were not closed on steamer's arrival on Sept. 28. Arguments were addressed to me on the point whether the exception clause was available to protect the charterers. If this were the only point, I think I should be bound, as a judge of first instance, by the decisions of MATHEW, J., in *Barrie* v. *Peruvian Corpn., Ltd.* (1) and of BIGHAM, J., in *Re Newman and Dale Steamship Co.* (2). The clause in the latter charter is, I think, indistinguishable from this charter while the exception "fire from any cause on land" in this charter seems to point to charterers' obligations rather than shipowners' duties. But I do not think the point is whether the exceptions apply to the charterers. It is probably true that "restraints of princes" did not prevent the doing of anything the charterers had to perform, but did they prevent the shipowner carrying out his part of the contract for such a time that the charterers need not be called on to do their part, because, even if they did it, there was no reasonable probability of the adventure proceeding? Were the charterers bound to put a valuable cargo into a ship's hold subject to the shipowner's claim for full freight, if the state of things was such that there was no reasonable probability of the shipowner being able to proceed on the voyage and overcome the restraints of princes then existing? The breach alleged in the statement of claim was the purported cancellation of the charter on Oct. 21. At that time there was war existing between Greece and Turkey, and, in my opinion, there was no reasonable probability that Turkey would allow Greek ships to pass through the Dardanelles again during the war. This view, in my opinion, is supported by the decision and reasons in *Geipel* v. *Smith* (3) and *Nobel's Explosives Co.* v. *Jenkins & Co.* (4). In the former case, the blockade of Hamburg in the Franco-German war was held to excuse a shipowner from loading coal at Newcastle in order to proceed to Hamburg if the blockade was raised. COCKBURN, C.J., said (L.R. 7 Q.B. at p. 411):

> "It is contended by the plaintiffs that the contract is divisible into two parts, and that the defendants ought to have performed the first part, which was practicable, in order to be in a position to perform the second, which was not. But the answer of the defendants is that the contract is one entire contract, and that the impossibility of performing the whole within a reasonable time dispensed with the necessity of taking any steps towards its performance. And it is perfectly obvious that this is so; for what good would it have been to the shipper that the shipowner should go to the spout and take in the coals if he could not proceed with the cargo to Hamburg? None whatever. It is an entire contract, and anything that applies to make the performance of one part impossible must be taken to apply to the whole; and it is admitted that the defendants could not have got to their port of destination. The true way of looking at this case, as it appears to me, is this: It was an entire contract, and there was an insuperable obstacle in the performance of it in toto;

and the defendants were therefore justified in not performing that part of it which was possible, but which, without the possibility of performing the other part of it was useless."

So in *Nobel's Explosives Co.* v. *Jenkins* (4) the probability of capture of the cargo somewhere on the thousand miles of sea between Hong Kong and Yokohama was held by MATHEW, J., to justify the shipowner in refusing altogether to proceed beyond Hong Kong.

Counsel for the shipowner argued that the well-known doctrine of frustration of the commercial adventure by unreasonable delay laid down in *Jackson* v. *Union Marine Insurance Co.* (5) did not apply if the shipowner had cargo on board, so that the contract was part executed. This, which was a favourite argument of the late WALTON, J., and based by him on some expressions of LORD BLACKBURN in *Dahl* v. *Nelson, Donkin & Co.* (6) (6 App. Cas. at p. 53), was addressed by him unsuccessfully to MATHEW, J. in *Nobel Explosives Co.* v. *Jenkins* (4). It seemed to me to fail to recognise that in *Jackson* v. *Union Marine Insurance Co.* (5) the charter was not executory but part executed, as the ship was proceeding under the charter to her port of loading, and it received its deathblow in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (7), where the vessel had a cargo on board and yet the charter was held by the House of Lords to be avoided and the freight lost by such delay as frustrated the adventure.

I hold, therefore, that, at the time of the breach alleged, October 21, an excepted peril, restraint of princes, prevented the charter being carried out by the vessel's proceeding on her voyage, and was, in the language of LUSH, J., in *Geipel* v. *Smith* (3) (L.R. 7 Q.B. at p. 414)

"likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

If there is such a likelihood and probability, the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event, and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed. As LORD GORELL said in *The Savona* (8) ([1900] P. at p. 259):

"I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered,"

and the whole of his subsequent remarks are valuable on this point. Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called on to make up their minds. For these reasons, I have come to the conclusion that there was no breach of contract by the charterers in not loading their cargo in this Greek ship; and there must, therefore, be judgment for the charterers on the question of liability.

Solicitors: *Holman, Birdwood & Co.*; *W. & W. Stocken.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

R. *v.* HUMPHRYS. Ex Parte WARD

[King's Bench Division (Bankes, Lush and Avory, JJ.), July 30, 1914]

[Reported [1914] 3 K.B. 1237; 84 L.J.K.B. 187; 30 T.L.R. 698; 111 L.T. 1110; 79 J.P. 67; 24 Cox, C.C. 455]

Bastardy—Affiliation proceedings—Jurisdiction of justices—Child born abroad Return of mother to England—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict.*, *c.* 65), *s.* 3.

The fact that a bastard child was born out of England does not, if the parents are resident in England, bar proceedings under the Bastardy Laws Amendment Act, 1872, in England.

R. v. *Blane* (1) (1849), 13 Q.B. 769, distinguished.

Notes. The Bastardy Laws Amendment Act, 1872, has been repealed by the Affiliation Proceedings Act, 1957. For s. 3 of the 1872 Act, see now s. 1 of the 1957 Act.

Distinguished: *Tetan* v. *O'Dea*, [1950] 2 All E.R. 695; *R.* v. *Wilson*, *Ex parte Pereira*, [1952] 2 All E.R. 706. Referred to: *Forsyth* v. *Forsyth*, [1947] 1 All E.R. 406.

As to affiliation proceedings, see 3 Halsbury's Laws (3rd Edn.) 110 et seq.; and for cases see 3 Digest (Repl.) 441 et seq. For the Affiliation Proceedings Act, 1957, s. 1, see 37 Halsbury's Statutes (2nd Edn.) 36.

Cases referred to:

(1) *R.* v. *Blane* (1849), 13 Q.B. 769; 3 New Mag. Cas. 168; 3 New Sess. Cas. 597; 18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 13 Jur. 854; 116 E.R. 1458; 3 Digest (Repl.) 442, *337*.

(2) *Marshall* v. *Murgatroyd* (1870), L.R. 6 Q.B. 31; 40 L.J.M.C. 7; 23 L.T. 393; 35 J.P. 153; 19 W.R. 72; 3 Digest (Repl.) 441, *336*.

Also referred to in argument:

Hampton v. *Rickard* (1874), 43 L.J.M.C. 133; 30 L.T. 636; 38 J.P. 646; 3 Digest (Repl.) 441, *335*.

R. v. *Lightfoot* (1856), 6 E. & B. 822; 25 L.J.M.C. 115; 27 L.T.O.S. 235; 20 J.P. 677; 2 Jur.N.S. 786; 4 W.R. 655; 119 E.R. 1070; 3 Digest (Repl.) 451, *406*.

Rule Nisi calling on William John Humphrys and others, justices of the city of Hereford, to show cause why a writ of certiorari should not issue to remove into the High Court an order made by the justices on June 8, 1914, whereby it was adjudged that George Henry Ward was the putative father of a certain bastard child of one Caroline Frances Jenkins, and whereby it was ordered that George Ward should pay Caroline Jenkins the sum of 5s. per week until the child should attain the age of sixteen years or should die.

The rule was obtained at the instance of Ward on the ground that the justices had no jurisdiction to make the order, the child in question having been born in New South Wales. In the affidavits of George Ward and his solicitor, the facts were set out as follows: On April 27, 1914, Ward was served with a bastardy summons issued on the application of Caroline Jenkins. The summons came on for hearing before justices for the city of Hereford on May 11, 1914. At the hearing, the complainant Jenkins appeared and gave evidence on oath that her bastard child, the subject of the summons, was born in New South Wales, and produced the certificate of birth of the child. The applicant's solicitor submitted that the justices had no jurisdiction to adjudicate on the case, and the justices adjourned the hearing. On June 8, 1914, the solicitor again appeared on behalf of the applicant. It was admitted by the solicitor then appearing for the complainant and again sworn by the complainant that the bastard child was born in New South Wales. The

applicant's solicitor submitted that the justices had no jurisdiction to adjudicate on the case and referred the justices to *R.* v. *Blane* (1), but the justices overruled his objection and adjudged that the applicant was the father of the bastard child. It appeared before the justices, though it was not on affidavit, that the complainant and applicant were resident in England, that in 1912 the complainant went to Australia, where she was informed by a doctor that she had been pregnant for some months, that the bastard child was born in Sydney, New South Wales, on May 18, 1913, and the complainant afterwards returned to England and took proceedings against the applicant.

The Bastardy Laws Amendment Act, 1872, provides:

"3. Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act may either before the birth or at any time within twelve months from the birth of such child . . . make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts."

Rowsell showed cause against the rule.

S. R. C. Bosanquet in support of the rule.

BANKES, J.—This was a rule obtained on an affidavit sworn by Mr. Matthews, the solicitor who appeared for the applicant, against whom a bastardy summons had been taken out and served on April 27, 1914. On the hearing of that bastardy summons, evidence was given by the complainant in which she stated that the child, the subject of the summons, was born in New South Wales. The affidavit is silent as to any of the facts which were proved before the justices except that one fact. The affidavit says nothing as to whether or not the complainant was a British subject or the applicant. It says nothing as to whether they were domiciled or resident in or out of England, or as to the circumstances under which the complainant left this country, and it says nothing as to where the child was begotten. It relies mainly on the fact that the child was born out of England, and counsel for the applicant obtained a rule on that affidavit by citing to the court *R.* v. *Blane* (1), and he now comes to the court and contents himself with saying that *R.* v. *Blane* (1) is an authority for the proposition that no person can obtain an order under the Bastardy Acts, whatever the circumstances may be, if the child is born out of England. I do not agree with that proposition, nor do I agree that *R.* v. *Blane* (1) decides that point. The facts in *R.* v. *Blane* (1) were that the mother was not a British subject and there was no evidence that she was domiciled in England. The Case states that she was a native of France, and the report in 13 Q.B. 769 states that the principal ground of objection to the order was that the magistrate had no jurisdiction to make it, because the mother of the child was a foreigner by birth and was in France when the child was born. That statement of facts makes it obvious that, in order to ascertain whether that particular child was a bastard or not, the status of the child, according to the French law, would have to be ascertained, and that the status of the child did not depend on the English law.

The Bastardy Laws Amendment Act, 1872, s. 3, says this:

"Any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act"

may apply, and so forth, and, therefore, on an application before the justices for an order it was a condition precedent that the mother should prove that she has

been delivered of a bastard child, and if she is an English subject resident and domiciled in England, and the father is also an English subject resident and domiciled in England, the mere fact that the putative father is the father of the child, and the parties were unmarried, decides the question whether that child is or is not a bastard child. If facts are given in evidence before the justices which indicate that the status of the child is governed by some foreign law, and that the condition precedent of proving that the particular child is a bastard child needs to be decided by some law other than the English law, I quite agree that the particular case would have been brought within the decision of *R.* v. *Blane* (1); but, in the absence of any such evidence, in my opinion it is not the law, nor does *R.* v. *Blane* (1) decide that the mere fact that the child of English parents has been born a bastard outside the limits of England is a bar to the proceedings. Take the case that I put in the course of the argument—supposing that the parents of the child were both domiciled and resident in England, and that, for the mere purpose of concealing her shame, the woman goes to Scotland or to France to be confined and comes straight back and takes out a summons against the putative father, what ground is there for suggesting that the Act does not apply in that case? What law is there which has to be considered except the English law? As far as I can see, none, and it is quite consistent with the facts before us that it is apparent in a case of this kind and in the absence of further evidence, that the rule should not be made absolute.

I wish, now, to say a few words about *R.* v. *Blane* (1). The facts there show that the woman was a single woman and a native of France. The report states that the principal ground of objection was that the mother was a foreigner and was in France at the time the child was born. LORD DENMAN, C.J., in giving judgment, said (13 Q.B. at p. 772):

> "Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws"

—meaning, as I understand it, that that is clearly a case in which the status of the child has to be ascertained according to the French law; even assuming that the magistrate has examined the law of France and ascertained that, according to that law, the child was a bastard. With that view one must entirely agree, because, in the case of a statute, such as the Poor Law Amendment Act, 1844, which according to s. 75 of the Act, is confined to England and Wales alone, it is plain that it was not competent for the magistrate to apply any other than the English law for the purpose of deciding the particular facts which were brought before him on that application. Again, COLERIDGE, J., in his judgment, as it seems to me, based his decision entirely on the question that the status of the child has to be ascertained by some foreign law. ERLE, J., in his judgment, said this (13 Q.B. at p. 774):

> "It is quite clear that our statutes relating to bastardy never contemplated the case of a child born a bastard in a foreign country,"

by which I understand born a bastard according to some law other than the English law.

Therefore counsel in support of the rule has failed to satisfy me that this particular case comes within the principle laid down in *R.* v. *Blane* (1), and I think, on the facts at present before us, that there is nothing which prevents the justices from making the order which they in fact made, and, therefore, the rule ought to be discharged.

AVORY, J.—If this case were res integra I should unhesitatingly come to the same conclusion as that which my Lord has already expressed, and particularly in view of the point which I put during the argument—namely, that the Bastardy

Laws Amendment Act, 1872, contemplates that the application may be made by a woman before the birth of the child. In such a case, it is obvious that she may go to the justices in the jurisdiction where she is residing and the justices may then grant a summons. It is true that, before the order is made, she must wait until the birth of the child, but the statute obviously contemplates that the same justices who have granted her the summons before the birth of the child will proceed to adjudicate on that summons after the birth of the child. Taking the case which has been put as an illustration, I cannot believe that the mere fact that a woman has in the meantime gone across the Channel and has returned and the child has been born on the other side of the Channel would deprive the justices of the exercise of the jurisdiction that they originally exercised in granting a summons under the statute; but, speaking for myself, I am unable to say that *R.* v. *Blane* (1) does not decide the very point before us. I agree there is a distinction, and a most important distinction, in the fact that, in that case, the mother was a foreigner. It is true that the report states that the principal ground of objection to the order was that the magistrate had no jurisdiction to make it because the mother of the child was a foreigner by birth and was in France when the child was born. But when I look at the judgments of LORD DENMAN, C.J., and COLERIDGE, J., I must say that I am unable to put the same construction on them that the other members of the court, I am glad to say, are able to put on them. LORD DENMAN said (13 Q.B. at p. 772):

> "Assuming that the magistrate who made this order has examined the law of France, and ascertained that according to that law the child is a bastard, we are clearly of opinion that children born out of this country are not the subject of our bastardy laws."

I must say I read that as meaning this: "even if, according to the law of France, the child in that case is a bastard, nevertheless we are of opinion that a child born out of this country is not the subject of our bastardy laws." If he had intended that which my Lord has expressed, it seems to me that he would have said: "Assuming the magistrate who made this order had examined the law of France and had ascertained that according to that law the child was a bastard, we are clearly of opinion that such a child as the one in the present case, born out of this country, is not the subject of our bastardy laws, because it is the child of a foreign mother." It would be quite easy to say that, if that were the real decision. COLERIDGE, J., in his judgment, said (13 Q.B. at p. 773):

> "The legislature in all these statutes is obviously dealing with bastards born in some parish; that is, in this country."

I am unable, therefore, to say that the actual point that is before the court in this case was not the real ground of the decision in *R.* v. *Blane* (1), or that the order was properly made in this case.

LUSH, J.—I can see nothing either in the Poor Law Amendment Act, 1844, or in the Bastardy Laws Amendment Act, 1872, to indicate that unless the child is born in England or Wales, the Act does not apply. Because the mother, who is domiciled and resident in England, goes to Scotland and is confined there and then returns to the place where she was resident before, I can see nothing to suggest that in that case the statute does not apply. I can see, on the other hand, a good deal to indicate that, when the mother is a foreigner and the child is born abroad, the Act could not apply, because the Act of 1872, in s. 3 says

> "any single woman who may be with child or who may be delivered of a bastard child after the passing of this Act"

may make the application and so on. There is a great deal to indicate that, in the case of a foreign mother, where the child is born abroad, the Act would not apply, because, if it did, it would necessitate an inquiry into the status of the

child, the legitimacy or illegitimacy of the child, and for that purpose one would have to consider what the foreign law was on the subject.

In *R.* v. *Blane* (1), the facts were that the mother was a foreign subject and that the child was born abroad, and, therefore, the court was confronted with that very difficulty—namely, that, if the Act applied in that case, it would be necessary for the court to inquire into the status of the child according to the law of the place where the mother was domiciled, and consequently, the court, as I think, dealing with that difficulty, came to the conclusion that the Act did not apply. LORD DENMAN, C.J., and COLERIDGE and ERLE, JJ., agreed that the order must be quashed. It is quite true that, if we look at the judgments, we find in the judgment of LORD DENMAN, and I think in the judgment of COLERIDGE, J., that they would appear to go the whole length of saying that, even if the mother was a British subject, the Act would not apply if the child were born abroad, but it was not necessary for the court to decide that. ERLE, J., does not seem to have considered it or to have dealt with it, and the real question that I think was dealt with and decided in that case was whether the child of a foreign mother born abroad was a bastard child in respect of whom the order could be made under the Poor Law Amendment Act, 1844.

It is necessary, I think, to refer not only to *R.* v. *Blane* (1), but also to *Marshall* v. *Murgatroyd* (2), and it is interesting to observe this, that, in the course of the argument in that case, according to the report in the LAW JOURNAL, LUSH, J., pointed out, when the argument was put forward that the child must be born in England or in Wales in order that the Act should apply, that the Act did not say so. No counsel appeared there for the respondent, and BLACKBURN, J., is reported to have said (40 L.J.M.C. at p. 8):

> "We think that the decision in *R.* v. *Blane* (1) is correct, and that the Act applies only to a child born of a mother in English territory."

But in the report in the LAW REPORTS, that passage is omitted from the judgment, and BLACKBURN, J., there does not say a word about *R.* v. *Blane* (1), and confines his judgment to the facts before the court in *Marshall* v. *Murgatroyd* (2), and says that the child was not born abroad but was born on a British ship.

Those are the two authorities, and the question for us is whether *R.* v. *Blane* (1) concludes this case in which, as I have said, the mother is not a foreign mother but was resident in England and went to Australia, and was confined there and returned to England. I can find nothing in the statute to suggest that, in such a case, the order could not be made under the Act, and I do not think that the decision in *R.* v. *Blane* (1), when properly considered, in the least concludes us in this case, or compels us to say that the mere fact that the child was born abroad prevents an order from being made.

For these reasons, I think the rule should be discharged.

Rule discharged.

Solicitors: *Metcalfe & Sharpe*, for *Thomas A. Matthews*, Hereford; *Andrew, Wood, Purves & Sutton*, for *Corner & Co.*, Hereford.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

C. GROOM, LTD. *v.* BARBER

[King's Bench Division (Atkin, J.), November 17, 18, 1914]

[Reported [1915] 1 K.B. 316; 84 L.J.K.B. 318; 112 L.T. 301; 31 T.L.R. 66; 59 Sol. Jo. 129; 12 Asp.M.L.C. 594; 20 Com. Cas. 71]

Sale of Goods—Contract—C.i.f. contract—"War risk for buyer's account"—Goods not appropriated to contract before tender of documents—Sufficiency of tender.

By a contract of sale on c.i.f. terms, the buyers bought from the seller one hundred bales of cloth. The contract of sale provided that should the goods not arrive from loss of vessel or other unavoidable cause, the tender to the buyers of the insurance policy with the bill of lading should be deemed a good tender of the goods so not arriving. There was also a condition "war risk for buyer's account." Part of the goods were shipped and the shippers took out a policy of insurance which did not cover war risk. The seller tendered the documents including the insurance policy, but on the day after the tender, the ship which was carrying the goods was sunk by enemy action. The buyers refused to accept the tender of the documents as the goods had already been lost.

Held: (i) the condition in the contract of sale "war risk for buyer's account" meant that the war risk was the buyers' concern and there was no obligation on the seller to effect such an insurance at the buyers' expense; (ii) in a c.i.f. contract of sale, tender of the proper documents (ordinarily the bill of lading, the invoice and the policy of insurance) within a reasonable time of shipment was due performance of the contract, and it was immaterial in whom the property of the goods was before tender; the seller's obligation could not depend on whether the goods were lost or not and he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender; accordingly, the buyers were not relieved from their obligations under the contract.

Notes. Distinguished: *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*, *Theodor Schneider & Co.* v. *Burgett and Newsam*, [1915] 2 K.B. 379. Referred to: *Upjohn* v. *Hitchens*, *Upjohn* v. *Ford*, [1918] 1 K.B. 171; *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.*, [1918–19] All E.R.Rep. 980; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R.Rep. 283; *Smyth & Co.* v. *Bailey, Son & Co.*, [1940] 3 All E.R. 60.

As to c.i.f. contracts, see 34 Halsbury's Laws (3rd Edn.) 164 et seq.; and for cases see 39 Digest 575 et seq.

Cases referred to:

(1) *Biddell Bros.* v. *E. Clemens Horst Co.*, [1911] 1 K.B. 214; 80 L.J.K.B. 584; 103 L.T. 661; 27 T.L.R. 47; 16 Com. Cas. 8; reversed, [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; 27 T.L.R. 331; 55 Sol. Jo. 383; 12 Asp.M.L.C. 1; 16 Com. Cas. 197, C.A.; reversed sub nom. *E. Clemens Horst Co.* v. *Biddell Bros.*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 28 T.L.R. 42; 56 Sol. Jo. 50; 12 Asp.M.L.C. 80; 17 Com. Cas. 55, H.L.; 39 Digest 575, *1801*.

(2) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 39 Digest 560, *1677*.

Also referred to in argument:

Yuill & Co. v. *Robson*, [1908] 1 K.B. 270; 77 L.J.K.B. 259; 98 L.T. 364; 24 T.L.R. 180; 52 Sol. Jo. 192; 11 Asp.M.L.C. 40; 13 Com. Cas. 166, C.A.; 29 Digest 80, *392*.

Award stated in the form of a Special Case.

By a contract in writing dated June 8, 1914, J. F. Barber, a merchant of Mincing Lane, London (hereinafter called "the seller"), sold to C. Groom, Ltd., of No. 36 Gracechurch Street, London (hereinafter called "the buyers"), on the terms of the rules and regulations for the time being in force of the United Kingdom Jute Goods Association, Ltd., and subject to the conditions endorsed on the contract, one hundred bales of Hessian cloth at 18s. 6d. per hundred yards for shipment from Calcutta, one half between June 1 and 30 and the other half between July 1 and 15, 1914, by steamer and/or steamers to London on c.i.f. terms, the latter to be with particular average for gross invoice amount, plus 10 per cent. for payment by cash against documents less any usual rebate. Amongst other things, the contract provided that:

"(4) Should the goods or any portion thereof not arrive from loss of vessel or other unavoidable cause, the tender to the buyer of the insurance policy with the bill of lading or other document or documents which with the policy will enable the buyer to recover the amount of the insurance from the underwriters shall be deemed a good tender of the goods so not arriving. (5) Ship's name to be declared by the first seller without undue delay, and any declaration so made shall be valid as regards successive buyers if passed on without undue delay, and no vessel to be declared which has already entered at the custom house. (8) . . . Where W.P.A. insurance has been contracted for, average is to be payable on each bale if amounting to 3 per cent. 'war risk for buyer's account.'"

It was admitted by the parties that, on the same day that this contract was made —June 8, 1914—the seller had bought identical goods on identical terms, except as regards price, from Messrs. Becker, Gray & Co., merchants and shippers of London and Calcutta. The goods which came into question in this arbitration were twenty-five of the bales which were to be shipped between July 1 and 15, 1914. On July 5, 1914, Becker, Gray & Co. duly shipped the goods at Calcutta in the steamship *City of Winchester*, and on July 16 took out an insurance policy on the goods which did not cover war risk, or, in other words, which contained the customary free from capture and seizure clause (f.c.s.). The shipping documents were sent to London through the medium of the Hong-Kong and Shanghai Banking Corporation. On Aug. 3, the seller wrote to the buyers calling their attention to the fact that war risk was for their account, and that the risk must be covered by them to protect their own interests. On Aug. 4, the buyers wrote to the seller contending that the seller was responsible for the insurance against war risk. In his reply the seller called the buyers' attention to rule No. (8), endorsed upon the contract, according to which the war risk was for the buyers' account. On Aug. 12, the buyers wrote to the seller with reference to the shipment in question and requested to be informed as to the boat the goods were coming by and when they left Calcutta, as the goods would have to be covered against war risk, and the buyers would not get the documents till the boat was nearly in this country. The buyers' letter continued: "Please let us have this information to-morrow so that we can get them covered." On Aug. 14, the seller replied that he so far had no advice of the name of the steamer carrying the goods. On Aug. 20, the seller received information regarding the name of the steamer carrying the goods, the information being contained in an invoice received by him from Becker, Gray & Co. Within about an hour of the receipt of this invoice the seller dispatched a similar invoice to the buyers. On Aug. 21, at 2.27 p.m., the loss of the steamer *City of Winchester* was posted at Lloyd's, she having been captured on Aug. 6 by a German cruiser and subsequently sunk. It was not contended that any earlier information was received in London regarding such loss. The invoice was the only document which the buyers received from the seller. The parties admitted that it was to be presumed from the delivery of an invoice that the seller was in a position to deliver the documents under the contract. On Aug. 22 the buyers wrote to the seller returning the invoice because the *City of Winchester* had been captured

on Aug. 6, and stated that, although the buyers had asked previously for the name of the steamer, the seller's invoice received on Aug. 21 gave the first advice. Under the circumstances the buyers refused to accept any responsibility in the matter. The policy which the seller was in a position to tender to the buyers, together with the bills of lading, was the usual form of Lloyd's policy, and it contained the free from capture and seizure clause.

The matter was thereupon referred to arbitration under the terms of the contract, the seller claiming that he was entitled to be paid at the maturity of the shippers' draft—namely, Nov. 23, 1914—the sum of £441 2s., or such sum at an earlier date less the usual rebate, whilst the buyers contended that they were entitled to refuse the documents and regard the contract as unfulfilled. The umpire found that the buyers were responsible for war risk and awarded £441 2s. to the seller. On appeal to the appeal committee, the buyers contended that: (1) (a) It was the duty of the seller to insure against risks of war. (b) There was no proper presentation of documents to the buyers unless the seller tendered or was in a position to tender a policy or policies of insurance which would enable the buyers to recover against the insurer for the loss of the goods. (c) The documents tendered, or which the seller was in a position to tender, were not a good tender under cl. (4) of the contract. (2) (a) No property in the goods passed to the buyers because no goods in a deliverable state were unconditionally appropriated to the contract by the seller with the consent of the buyers. (b) When the seller invoiced the goods to the buyers and tendered, or was in a position to tender, the documents and purported to appropriate the goods to the contract they had ceased to exist; and, as a consequence, (c) Unless the seller tendered, or was in a position to tender, documents which entitled the buyers to receive the goods or obtain a complete indemnity for the loss of them the buyers were not bound to pay the price. The buyers' contention that there was undue delay by the seller in declaring the ship's name was withdrawn in the course of the hearing. The statement on behalf of the buyers that they could not have insured against the war risk until the name of the vessel was known was contrary to the experience of the committee and could not be upheld. As regards the first contention, the committee decided, as a question of fact, that the insurance policy referred to in cl. (4) of the conditions was by the custom of the trade a policy which contained the free from capture and seizure clause, and that the tender of such a policy was a sufficient tender within the meaning of the contract, and that there was no custom of the trade and it had never been the practice for a seller to effect any war risk insurance for buyer's account, and that the tender of a war risk policy had never in practice been made by merchants or others doing business in jute goods. The committee further decided that the legal interpretation of the contract was that the war risk was upon the buyers, and that the buyers had no right to claim from the seller the delivery of a policy covering the war risk. As regards the second contention, the committee was of opinion that the seller fulfilled his obligation under the contract by intimating to the buyer that he was in a position to deliver the documents deliverable under the contract, and that it was the buyer's obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state was not a sufficient ground to relieve the buyers from their obligation under the contract. Consequently, the committee awarded and decided that the buyers were to pay to the seller £441 2s. on the twenty-third day of November, one thousand nine hundred and fourteen. In case the matters in question should be referred to the court for its decision, and it should be decided that the documents which the seller was in a position to tender were insufficient owing to there being no insurance against war perils or that there had not been a valid appropriation of the goods to the contract, then the committee decided that the buyers are entitled to recover nothing from the seller.

Maurice Hill, K.C. (*L. F. C. Darby* with him), for the buyers.
Mackinnon for the sellers.

ATKIN, J., stated the facts and contentions, and continued: I think it is an incident of a c.i.f. contract as stated by HAMILTON, J., in his judgment in *Biddell Bros.* v. *E. Clemens Horst Co.* (1) that a seller under a contract of sale has, among other things, to arrange for an insurance on the terms current in the trade which will be available for the benefit of the buyer. I am satisfied that, at the time this contract was made, the terms current in the trade were terms which would exclude war risk—in other words, that the terms of the policy would contain the f.c.s. clause. I am, therefore, of opinion that, apart from the special terms of the contract, a policy in such terms would in fact be in order. The finding of the appeal committee in that respect makes that matter quite certain. But this contract contains the words: "War risk for buyer's account." This is said to mean that the seller must, by virtue of the contract, take out a policy covering the war risk, but that he may charge the buyer with the expense of it. The contention amounts to this: that at all times, in times of peace, a war risk policy ought to be taken out at the expense of the buyer. I am perfectly satisfied myself that no seller or buyer ever contemplated such a thing being done, and that, if a buyer was charged with such a policy in ordinary times of peace, he would be the very first person to object. To my mind, those words mean that war risk is the buyer's concern; if the buyer wants to cover a war risk he must take the necessary steps himself. The words may mean that, in the proper course of business, the buyer is entitled to ask the seller to take out a policy of insurance against war risk, at the buyer's expense, at the time when he is taking out the other policy. I do not decide that it does mean that, but it may do so. If it does, I am quite satisfied that, in this case, the buyers never did in fact request the seller to take out a war risk policy on those terms, because, when they did make their request, the buyers never intended themselves to pay the cost. They merely intimated that the seller was under the obligation to take out the policy at the seller's expense. Under those circumstances, I am satisfied that, on this point, the contention of the buyers fails, that the award is perfectly right, and that the policy was in order.

The next question is one of general interest on contracts on c.i.f. terms. It is contended that the seller cannot tender documents representing goods which were lost at the time of the tender because, at the time of the loss, there had been no goods appropriated to the contract so as to have passed the property to the buyer. It is said that, as the goods tendered were non-existent, the documents were not in order. The appeal committee dealt or, at any rate, appeared to have dealt, with the point in their award. They say:

> "As regards the second contention, the committee is of opinion that the seller fulfilled his obligation under the contract by intimating to the buyers that he was in a position to deliver the documents deliverable under the contract, and that it was the buyers' obligation to take up such documents, and that the fact that the goods had been lost by a war peril and were in consequence not in a deliverable state is not a sufficient ground to relieve the buyers from their obligations under the contract."

I am not sure that this finding quite fully deals with the point as to the property not being in the buyers at the time of the loss. It was contended on the part of the buyers that in a c.i.f. contract, the seller's duty is so to act as to pass the property to the buyer, either on shipment or, at any rate, in case of loss, at some time before the loss. It is said that if this is not done, the seller cannot make a valid delivery under the contract, inasmuch as there are no goods in existence which can be said to be the buyer's goods, or which can be so appropriated as to become the buyer's goods. The committee have not dealt with the question of fact whether there was any appropriation in fact of goods to this contract by or on behalf of the seller. In the view that I hold, the question is immaterial, but, if it had become material, I should have had to refer the Case back to the arbitrators for a finding. On the evidence as disclosed in the Case there does

not appear to have been any appropriation, and I shall assume that there was none.

What is the meaning of a contract for the sale of goods on c.i.f. terms? I think the answer has been given authoritatively in the judgment of HAMILTON, J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (1). He says ([1911] 1 K.B. at p. 220):

> "The meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to the authorities upon the subject. A seller under a contract of sale containing such terms has first to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by BLACKBURN, J., in *Ireland* v. *Livingston* (2) (L.R. 5 H.L. at p. 406) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage."

In my opinion the result is that the contract of the seller is performed by delivery to the buyer, in reasonable time from the agreed date of shipment, documents which are ordinarily the bill of lading, the invoice, and policy of insurance, which will entitle him to recover on the policy the value of the goods lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It, therefore, becomes immaterial whether before the date of the tender of the documents the property in the goods was vested in the seller, the buyer, or some third person. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender; nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were otherwise, the shipper of goods in bulk or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. The seller's obligation cannot depend on whether the goods are lost or not, and, if there is no loss, and the property has to pass to the buyer before delivery of the documents, at what stage of the transaction must it pass? Unless it be at the time of shipment, I can see no reason for fixing on any other time than on delivery of documents, and, if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarrassed. I do not think that the above is inconsistent with the judgment of KENNEDY, L.J., in *Biddell Bros.* v. *E. Clemens Horst Co.* (1). Difficult questions arise as to time when, in performance of a contract on c.i.f. terms, the property passes to the buyer. But the question when in fact the property passes is distinct from the question whether the seller undertakes, as a term of the contract, that the property shall pass at a given time, and the lord justice is only dealing with the former question. After the decision of the House of Lords in *Biddell Bros.* v. *E. Clemens Horst Co.* (1), I do not think it necessary to consider former cases. The object of the courts in construing commercial contracts is to try to give effect to the intention of both the contracting parties, and not to impose on business men terms which they never contemplated. If old forms are now used to express different meanings from those read into them in earlier days, the courts should be prompt to recognise the altered use if they are satisfied that there is in fact a change. I do not say that a contract on c.i.f. terms means to-day anything different to what it ever meant, but if the courts at other times have rightly imputed to the contract a

different meaning to what I have suggested in my judgment, the true meaning of the words is now altered. I am further of opinion that, in this particular contract, the meaning which I have said is the true meaning of a c.i.f. contract is explicitly stated in cl. (4). [HIS LORDSHIP real cl. (4), and continued:] The amount of the insurance means, in my opinion, the amount of the insurance if the loss is such as was agreed in the contract of sale to be covered, and in this case I think there was a good tender in the terms of this clause. The result is that the award of the arbitrators in favour of the seller must stand, and that the buyers must pay the cost of this hearing.

Judgment for the seller.

Solicitors: *Druces & Attlee*; *B. A. Woolf & Co.*

[*Reported by* W. V. BALL, ESQ., *Barrister-at-Law.*]

WYNN *v.* CONWAY CORPORATION

[KING'S BENCH DIVISION (Joyce, J.), March 20, 1914]

[Reported [1914] 2 Ch. 705; 84 L.J.Ch. 203; 111 L.T. 1016; 78 J.P. 380; 30 T.L.R. 418; 58 Sol. Jo. 432; [1914] W.N. 142]

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.J.), July 17, 1914]

[Reported [1914] 2 Ch. 705; 84 L.J.Ch. 203; 111 L.T. 1016; 78 J.P. 380; 30 T.L.R. 666; 59 Sol. Jo. 43; 13 L.G.R. 137]

Landlord and Tenant—Lease—Covenant for renewal—"Every eleven years of the said term"—Every first eleven years of each renewed term.

A lease for twenty-one years contained a covenant for renewal in the following terms: "And the said lessors covenant with the lessee that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of £7 10s. for a fine for the said premises that then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire the lessors will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of £7 10s. on the day or time hereinbefore limited or appointed."

Held: the words in the covenant "every eleven years of the said term" meant every first eleven years of the term and, therefore, the covenant conferred a perpetual right of renewal at the end of every successive period of eleven years.

Hare v. *Burges* (1) followed.

Notes. Distinguished: *Re Greenwood's Agreement, Parkins* v. *Greenwood*, [1950] 1 All E.R. 436.

As to covenants for renewal of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 625 et seq.; and for cases see 31 DIGEST (Repl.) 66 et seq.

Cases referred to:

(1) *Hare* v. *Burges* (1857), 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; 22 J.P. 84; 3 Jur.N.S. 1294; 6 W.R. 144; 70 E.R. 19; 31 Digest (Repl.) 80, *2333*.

(2) *Rochford* v. *Hackman* (1852), 9 Hare, 475; 21 L.J.Ch. 511; 19 L.T.O.S. 5; 16 Jur. 212; 68 E.R. 597; 44 Digest 548, *3657*.

(3) *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844; 54 L.J.Q.B. 6; 52 L.T. 222; 33 W.R. 325, H.L.; 31 Digest 76, *2302*.

Also referred to in argument:

Baynham v. *Guy's Hospital* (1796), 3 Ves. 295; 30 E.R. 1019; 31 Digest (Repl.) 80, *2328*.

Moore v. *Foley* (1801), 6 Ves. 233; 31 E.R. 1027; 31 Digest (Repl.) 80, *2329*.

Sadlier v. *Biggs* (1853), 4 H.L.Cas. 435; 22 L.T.O.S. 69; 10 E.R. 531, H.L.; 31 Digest (Repl.) 81, *2338*.

Browne v. *Tighe* (1834), 8 Bli.N.S. 272; 2 Ch. & Fin. 396; 5 E.R. 944, H.L.; 31 Digest (Repl.) 81, *2342*.

Atkinson v. *Pillsworth* (1787), 1 Ridg. Parl. Rep. 449; Vern. & Scr. 157; 31 Digest (Repl.) 80, **796*.

Palmer v. *Hamilton* (1793), 2 Ridg. Parl. Rep. 535; 31 Digest (Repl.) 80, **797*.

Sheppard v. *Doolan* (1842), 3 Dru. & War. 1.

Chambers v. *Gauszen* (1844), 2 Jo. & Lat. 99; 31 Digest (Repl.) 80, **798*.

North-Eastern Rail. Co. v. *Lord Hastings*, [1900] A.C. 260; 69 L.J.Ch. 516; 82 L.T. 429; 16 T.L.R. 325, H.L.; 30 Digest (Repl.) 476, *1187*.

Action.

By an indenture of lease made in 1824, the defendant corporation demised certain hereditaments and premises to a lessee, his executors, administrators, and assigns for twenty-one years from Sept. 29, 1824, at a rent of 8s. per annum. The lease contained a covenant for a renewal thereof at the expiration of the first eleven years of the term in the terms of the covenant for renewal hereinafter stated. In 1832 the lessee died, and a fresh lease was granted to his executor in 1835 containing a similar covenant for renewal. Subsequent renewals of the lease were from time to time made by the corporation to the executor, and after his death to the plaintiff in this action, each containing a similar covenant for renewal. By a lease dated Aug. 5, 1901, and made between the defendant corporation and the plaintiff, the premises were granted to the plaintiff for twenty-one years from Sept. 29, 1901, at the yearly rent of 8s. and subject to the covenants on the part of the plaintiff and conditions therein contained. In that lease, the corporation entered into a covenant for renewal with the plaintiff in the following terms:

"And the said lessors covenant with the lessee that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of £7 10s. for a fine for the said premises that then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained and so often as every eleven years of the said term shall expire the lessors will grant and demise unto the lessee such new lease of the said premises upon surrender of the old lease as aforesaid

and paying such fine of £7 10s. on the day or time hereinbefore limited or appointed."

On Sept. 28, 1912, the plaintiff paid to the corporation the sum of £7 10s., and offered to surrender the last-mentioned lease on the grant to him of a new lease in accordance with the covenant. On the refusal of the corporation to grant such new lease of the premises, the plaintiff commenced this action against the corporation for specific performance of the covenant.

Macmorran, K.C., and *J. Tanner* for the plaintiff.
Hughes, K.C., and *J. M. Gover* for the defendant corporation.

Cur. adv. vult.

Mar. 20, 1914. **JOYCE, J.**—In this case the question is as to the true construction of a covenant for renewal in a lease from the defendant corporation to the plaintiff for a term of twenty-one years from Michaelmas, 1901. The plaintiff or his predecessors in title have been lessees of the corporation for a great number of years under a series of leases for twenty-one years, each lease being in the same form and containing such a covenant as is now in question in the same terms at a rent of 8s. per annum, and such leases have been regularly renewed at the end of the first eleven years of the term on payment of a fine of £7 10s. The later leases from 1824 (an important date, because prior to any of the Municipal Corporation Acts) are produced. The subsisting lease is dated in August, 1901, and is for twenty-one years from Sept. 29 of that year, so the first eleven years of the term expired on Sept. 29, 1912, whereupon the present dispute arose.

The covenant for renewal is in these terms:

"And the said lessors covenant with the lessee that they the lessors will at the expiration of the first eleven years of the term hereby granted in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors and upon such surrender as aforesaid and paying to the lessors at the expiration of eleven years aforesaid or upon the 29th day of September next after the determination of the said eleven years the sum of £7 10s. for a fine for the said premises that then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises hereby demised with the appurtenances for the term of twenty-one years to commence from the expiration of the said eleven years at with and under the like rents covenants and agreements as are in these presents mentioned expressed or contained."

Pausing here, it must be admitted that the covenant so far as I have read, having regard to the well-known authorities, would not have the effect of conferring a perpetual right of renewal. If the portion I have read had been followed by the words "including this present covenant," or by other words plainly indicating that the right of renewal was to be perpetual, then the result would have been different. In *Hare* v. *Burges* (1), LORD HATHERLEY, the then Vice-Chancellor, expressed his opinion as to the principle on which such covenants as the one which I have to consider ought to be construed. He says (4 K. & J. at p. 53):

"As regards the first and main question, I must hold that the covenant in the original lease is in effect a covenant for perpetual renewal. Mr. Batten argued, that this question must never depend upon mere inference; that, in the absence of words indisputably pointing to a perpetual renewal, words so strong that it is impossible to adopt any other construction, the court, although it may find in the instrument words apparently pointing to perpetual renewal, will not adopt that construction, if any other can by possibility be put upon the terms of the covenant."

That was the argument.

"To that view I cannot accede. It seems to me, that the true rule of construction in a case like this is that referred to by TURNER, L.J., as

Vice-Chancellor in *Rochford* v. *Hackman* (2) (9 Hare at p. 483), where he says that some effect must if possible be given to all the words of an instrument; and if the court sees no effect which can be given to certain words, unless they be construed in a particular manner, then, whatever mere presumption may stand in the way, it will construe them in that manner. The court is not at liberty to do violence to the words of the instrument, in order to carry into effect what is merely a presumption. So, in a case like the present, giving full weight to the argument, that there is a presumption against construing a covenant so as to amount to a covenant for a perpetual renewal, that primâ facie a lessor shall not be taken to have intended to enter into such a covenant, still there may be in the instrument expressions indicative of such an intention; and, if there be, the court will not force the construction, but will give effect to what appears to have been the lessor's intention."

LORD SELBORNE, always a very safe guide, in *Swinburne* v. *Milburn* (3) (9 App. Cas. at p. 850) says:

"I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a kind of perpetual renewal in cases of this kind; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."

In the present case, the covenant in question, after the portion I have read, proceeds in quite general terms: "and so often as every eleven years"—the words "so often as" and "every" involving in themselves the idea of recurrence or repetition—"of the said term shall expire, the lessors will grant and demise"—I suppose it is "demise," but it is a very odd word—"unto the lessee such new lease of the said premises upon the surrender of the old lease as aforesaid." Perhaps it is not quite clear whether the words "as aforesaid" refer to the surrender or quality, or describe such new lease, so that the meaning would be "such new lease as aforesaid upon surrender of the old lease." I think the term "the old lease" means the old or the subsisting lease for the time being, and it appears to me that the phrase "the said term," if "said" really means anything where it occurs in collocation with the words "so often as every eleven years," &c., means simply the term of twenty-one years, or the term granted, or the then subsisting term. "Every eleven years of the said term" must mean every first eleven years of the term. There are not two or three periods of eleven years in any one term of twenty-one years; or, in other words, it comes to this, that the meaning is, "so often as every successive period of eleven years shall expire." I take the fair and proper meaning of the words used, having due regard to the context, to be that, so often as every first eleven years of the term of twenty-one years (that is, the subsisting term of twenty-one years or the term of twenty-one years last granted) shall expire, the lessors will grant a similar new lease on the surrender of the old lease, and so on toties quoties. If the words I have been discussing, which must have some meaning, do not mean what I have indicated as my view, I am unable to see what rational meaning is to be given to them. The defendant corporation's struggle to escape from the conclusion I have arrived at by insisting that the phrase "the said term" means, and only can mean, the particular new term of twenty-one years from Sept. 29, 1912, for the granting of which term the earlier part of the covenant provides, and that these words, "so often," &c., operate on one single occasion only—that is, at the expiration of the first eleven years from 1912, or, in other words, in 1923, and at no other time. I am perfectly certain that this was not in fact the intention of the parties, nor can I bring myself to think that it is a fair or proper construction of the words used, having regard to the phrases "so often as," "every eleven years," and "the old lease," &c. If it had been intended by the words I am considering simply to provide for one new lease of twenty-one

years from Sept. 29, 1923, and on no other occasion, that intention would have been easily expressed in very much plainer language, and would have been very differently expressed.

I think I shall be following WOOD, V.-C., in *Hare* v. *Burges* (1), and not acting at variance with the opinion expressed by LORD SELBORNE in *Swinburne* v. *Milburn* (3), if I hold, as I do, that the effect of the covenant in the present case is to confer on the lessee a perpetual right of renewal at the expiration of every succeeding period of eleven years (because that is what it comes to), on payment of the fine of £7 10s.

The defendant corporation appealed.

Hughes, K.C., and *J. M. Gover* for the defendant corporation.
Macmorran, K.C., and *J. Tanner* for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of JOYCE, J., who has held that the plaintiff is entitled to a grant of a lease for twenty-one years, and also to perpetual renewal on certain terms. I entirely agree, not only with the decision of JOYCE, J., but for the reason he has assigned, and I have some hesitation in saying anything more than that I agree with his judgment. But after the argument that has been addressed I will say how the matter strikes me. We have heard that for ninety years a lease has been granted by the defendant corporation to the plaintiff and his predecessors on the same terms. I do not mention that as enabling us to interpret the true construction of this covenant, but at least we can say that it is not an absurd construction to say that it is a covenant for perpetual renewal. The date of the first grant is important, because it takes the case out of the Municipal Corporations Act. The last renewal was in August, 1901, and was for a term of twenty-one years from Michaelmas, 1901. The covenant is as follows: [HIS LORDSHIP read the covenant, and continued:] The important words are "so often as every eleven years of the said term shall expire" and so on. It is said that there cannot be more than one eleven years in a term of twenty-one years, so it is argued on behalf of the defendant corporation that you must disregard those words, and that you cannot give effect to them, because of the presumption against the right to perpetual renewal. I think the decision in *Hare* v. *Burges* (1) applies here, and that it is impossible to accept the defendant corporation's construction. I think the fair construction of the covenant is to interpret it as meaning that as often as a term of twenty-one years is in existence, there will be at the end of the first eleven years of that term a right to renewal for a further twenty-one years. I think, therefore, that this appeal fails, and must be dismissed with costs.

SWINFEN EADY, L.J.—I agree both with the decision and with the reasons of JOYCE, J.

PICKFORD, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Jaques & Co.*, for *W. Thornton Jones*, Bangor; *Dunkerton & Son*, for *Picton, Jones & Roberts*, Pwllheli.

[*Reported by* JOHN L. DENISON *and* R. C. CARRINGTON, ESQS., *Barristers-at-Law.*]

A

R. *v.* SCHAMA. R. *v.* ABRAMOVITCH

[Court of Criminal Appeal (Lord Reading, C.J., Bray, Avory, Lush and Atkin, JJ.), November 30, 1914]

[Reported 84 L.J.K.B. 396; 112 L.T. 480; 79 J.P. 184; 31 T.L.R. 88; 59 Sol. Jo. 288; 24 Cox, C.C. 591; 11 Cr. App. Rep. 45]

B

Criminal Law—Receiving stolen property—Direction to jury—Consideration of explanation of accused—Burden of proof.

On a charge of receiving property recently stolen, after the prosecution have proved possession by the accused and that the property has been recently stolen, the jury should be directed that they may, not that they must, if no reasonable explanation is given, find a verdict of guilty. But if an explanation is given which may be true, it is for the jury to say, having regard to all the evidence, whether the accused is guilty or not. If the jury, though not convinced of the truth of an explanation, think that it may reasonably be true, the accused is entitled to be acquitted, because the prosecution have not discharged the burden of proof which rests on them of satisfying the jury, beyond reasonable doubt, that the accused is guilty. This burden of proof always rests on the prosecution and never changes.

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Notes. Followed: *R.* v. *Aubrey* (1915), 11 Cr. App. Rep. 182; *R.* v. *Millington* (1915), 11 Cr. App. Rep. 86. Explained: *R.* v. *Bailey* (1917), 13 Cr. App. Rep. 27; *R.* v. *Norris* (1917), 86 L.J.K.B. 810. Considered: *R.* v. *Hamilton* (1917) 87 L.J.K.B. 734. Followed: *R.* v. *Badash* (1917), 87 L.J.K.B. 732; *R.* v. *Currell* (1935), 25 Cr. App. Rep. 116. Explained: *R.* v. *Booth* (1946), 175 L.T. 306; *R.* v. *Garth*, [1949] 1 All E.R. 773. Considered: *Cohen* v. *March*, [1951] 2 T.L.R. 402. Referred to: *R.* v. *Saunders* (1919), 14 Cr. App. Rep. 11; *Woolmington* v. *D.P.P.*, [1935] A.C. 426; *Mancini* v. *D.P.P.*, [1941] 3 All E.R. 272; *R.* v. *Meredith*, *R.* v. *Bluston*, *R.* v. *Bramley* (1943), 29 Cr. App. Rep. 40; *R.* v. *Aves*, [1950] 2 All E.R. 330; *R.* v. *Hepworth*, *R.* v. *Fearnby*, [1955] 2 All E.R. 918.

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As to receiving stolen goods, see 10 Halsbury's Laws (3rd Edn.) 809 et seq.; and for cases see 15 Digest (Repl.) 1142 et seq.

Cases referred to in argument:

G

R. v. *Stoddart* (1909), 73 J.P. 348; 25 T.L.R. 612; 53 Sol. Jo. 578; 2 Cr. App. Rep. 217, C.C.A.; 14 Digest (Repl.) 330, *3202*.

R. v. *Hagan* (*alias Smith*) (1913), 9 Cr. App. Rep. 25, C.C.A.; 15 Digest (Repl.) 1092, *10,835*.

R. v. *Crowhurst* (1844), 1 Car. and Kir. 370; 15 Digest (Repl.) 1154, *11,628*.

R. v. *Harmer* (1848), 12 J.P. 252; 2 Cox, C.C. 487; 15 Digest (Repl.) 1154, *11,625*.

H

R. v. *Smith* (1910), 5 Cr. App. Rep. 77, C.C.A.; 15 Digest (Repl.) 1092, *10,839*.

Appeal against convictions for receiving property knowing it to have been stolen, at the Central Criminal Court, before Mr. Commissioner Rentoul.

The appellants were convicted, with another man named Harris, of receiving sixteen packing cases which contained underclothes and other articles to the value of £320, knowing them to have been stolen. On Sept. 24, 1914, a carman took into his van goods which were consigned to Solomon Stern, Ltd., by the Great Eastern Railway. At 5 p.m. on that day he drove the van containing the goods in question to the premises occupied by one of the appellants. Harris paid £190 and took the goods from the carman, and Harris then sold them to Abramovitch for £213. Abramovitch sold them to Schama, who gave £240 for the goods. There was evidence that Schama on the same afternoon had drawn a considerable

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sum from his bank. Schama the next day sold the greater part of the goods to a foreign firm for £322, some of them remaining in his hands.

Travers Humphreys for the appellant Schama.
E. D. Purcell for the appellant Abramovitch.
H. D. Roome for the Crown.

LORD READING, C.J., delivered the following judgment of the court, in which he stated the facts, and continued: Clearly, on these facts the jury, if properly directed, could convict the accused. Counsel for both the appellants admit that there was evidence to go to the jury, and there is really only one question in the case—namely, whether the jury were properly directed before giving their verdict. It is essential that, in cases like the present, there should be a careful and proper direction. Where an accused person is charged with receiving property recently stolen, after the prosecution have proved possession by the accused and that the property has been recently stolen, the jury should be told that they may, not that they must, find the accused guilty, in the absence of any reasonable explanation. But if the explanation given may be true, it is for the jury to say, having regard to the whole of the evidence, whether the accused is guilty or not. If the jury consider that the explanation may reasonably be true, although they are not convinced of its truth, they should acquit the accused, because the Crown has not discharged the burden which rests on it of satisfying the jury, beyond reasonable doubt, that the accused is guilty. That burden always rests on the prosecution and never changes. The court is not making a new pronouncement of law, but is merely re-stating the law with a view to assisting those who have to preside at the trials of similar cases. In the present case, the summing-up must not be too critically dealt with after a long trial and speeches by counsel. But this court has to be satisfied that the right principle of law has been applied. On referring to the passages in the summing-up which have been the subject of criticism, it does appear that it was never put before the jury that, if they were satisfied as to the reasonable truth of the explanation put forward by the appellants, the Crown had not established, beyond reasonable doubt, that the appellants were guilty. This court, looking at the summing-up from a broad point of view, cannot find that principle of law anywhere stated, and the jury might have thought that, directly they were satisfied that the appellants were in possession of the stolen property, it lay on the appellants to prove the truth of their explanation. The direction given in the summing-up would have this effect, and the court cannot say that the direction given was right.

It has been argued on behalf of the Crown that the court should give effect to the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, on the ground that there has been no miscarriage of justice. We have often said that, where there has been misdirection in law, the court will not interfere if it is satisfied that the jury, if properly directed, must have found the same verdict; but if the court thinks that the jury might, but not that they must, have returned the same verdict, the court will give effect to the view which it takes of the summing-up. On the facts of the present case, the court cannot say that the jury on a proper direction must have convicted the appellants, and we, therefore, are of the opinion that the convictions must be quashed.

Appeals allowed.

Solicitors: *Osborn & Osborn*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

Re LAWSON. WARDLEY *v.* BRINGLOE

[CHANCERY DIVISION (Eve, J.), February 18, 1914]

[Reported [1914] 1 Ch. 682; 83 L.J.Ch. 519; 110 L.T. 573; 30 T.L.R. 335; 58 Sol. Jo. 320]

Will—Gift to "my domestic servants"—Companion housekeeper and nurse—Continuous service.

By his will a testator bequeathed the amount of one year's wages free of duty "to each of my domestic servants who shall have been in my service for two years prior to my decease and shall not be under notice to leave, whether given or received." At the testator's death there had been in his service for two years before his death a companion housekeeper, who supervised the maidservants in the house, and a certified male nurse, who did not work exclusively for the testator and did not live in the house, and for a period of four months during the two years before the testator's death was, with the consent of the testator, away on holiday, because of ill-health.

Held: the word "domestic" in the will was used in the sense of "household," and, therefore, both the housekeeper and the nurse were domestic servants; although the service of the nurse was not exclusive this did not make him less a servant of the testator, neither did his absence from the service for four months break the continuity of the relationship of master and servant; accordingly, both servants were entitled to the legacy claimed.

Notes. Considered: *Re King, Jackson* v. *A.-G.*, [1916–17] All E.R.Rep. 786. Applied: *Re Marryat, Westminster Bank, Ltd.* v. *Hobcroft*, [1948] 1 All E.R. 796. Considered: *Re Silverston, West-Cardy* v. *City of London Corpn.*, [1950] 2 All E.R. 475. Referred to: *Re Travers, Hurmson* v. *Carr*, [1916–17] All E.R. Rep. 904; *Re Bedford, National Provincial Bank, Ltd.* v. *Aulton*, [1951] 1 All E.R. 1093.

As to gifts to servants, see 34 HALSBURY'S LAWS (2nd Edn.) 323 et seq.; and for cases see 44 DIGEST 900 et seq.

Cases referred to in argument:

Pearce v. *Lansdowne* (1893), 62 L.J.Q.B. 441; 69 L.T. 316; 57 J.P. 760, D.C.; 34 Digest 37, *132*.

Re Ravensworth, Ravensworth v. *Tindale*, [1905] 2 Ch. 1; 74 L.J.Ch. 353; 92 L.T. 490; 21 T.L.R. 357, C.A.; 44 Digest 903, *7633*.

Townshend v. *Windham* (1706), 2 Vern. 546; 23 E.R. 954; 44 Digest 901, *7611*.

Darlow v. *Edwards* (1862), 1 H. & C. 547; 32 L.J.Ex. 51; 6 L.T. 905; 9 Jur.N.S. 336; 10 W.R. 700; 158 E.R. 1002, Ex. Ch.; 44 Digest 902, *7626*.

Re Earl of Sheffield, Ryde v. *Bristow*, [1911] 2 Ch. 267; 80 L.J.Ch. 521; 105 L.T. 236, C.A.; 44 Digest 903, *7634*.

Adjourned Summons.

Joseph Henry Lawson by his will, dated June 1, 1905, bequeathed

"to each of my domestic servants who shall have been in my service for two years prior to my decease and shall not be under notice to leave, whether given or received, the amount of one year's wages free of duty."

The testator died on April 28, 1912, and the last defendant was a person interested in the residuary estate of the testator. The testator's wife died on Feb. 21, 1907, and, the testator having been found incapable through disease of managing his own affairs, William Fenwick Mill was on July 4, 1907, appointed receiver under s. 116 of the Lunacy Act, 1880. The two first defendants, Lucy Raynor Burgess and William Bringloe, were in the testator's service at the time of his decease, and were not under notice to leave, whether given or received. Lucy R. Burgess

was engaged in July, 1906, by the testator's wife as housekeeper and companion at a yearly salary of £20, increased in August, 1909, to £40. She entered the service of the testator on Aug. 10, 1906. Her duties were to supervise the maids, to assist Mrs. Lawson in housekeeping, and to act as her companion. She assisted in light housework, and accompanied the testator, who was infirm, when he was walking out of doors. After Mrs. Lawson's death she continued to act as housekeeper. Her wages were paid by the receiver quarterly, and she continued her service until after the testator died. William Bringloe, a certified male nurse and masseur, was engaged on Feb. 19, 1907, as male nurse and attendant to the testator, but at first only temporarily and occasionally when required. On Sept. 6, 1907, he was engaged to attend the testator as male nurse and attendant, and was paid £1 1s. per week. He took one or more meals, but did not, as a rule, sleep in the house. On Nov. 29, 1910, he was engaged by the receiver at a salary of £2 2s. per week, usually paid every four weeks, to attend the testator twelve hours nightly, from 9 p.m. to 9 a.m., and continued this service without any break until the testator's death, with the exception that from June 26, 1911, to Oct. 23, 1911, by arrangement with the receiver, Bringloe had a holiday. He found that his health was being affected by the long hours and the arduous duties in attending the testator. It was understood between Bringloe and the receiver that Bringloe should return to his duties after his holiday. For the whole period during which his regular attendance on the testator continued Bringloe was entitled to undertake other work so long as it did not interfere with the hours of his employment in the testator's service. He undertook other work to a very limited extent during the latter period of his employment. This originating summons by the executors raised questions whether Lucy R. Burgess and William Bringloe were entitled according to the true construction of the testator's will to share under the bequest therein to the testator's domestic servants.

Stone for the plaintiff executors.
H. S. Preston for the defendant William Bringloe.
Warwick Draper for the residuary legatee.

EVE, J.—I think Miss Burgess was clearly one of the testator's domestic servants. She not only discharged household duties herself, but she also contributed to the comfort of her employer by relieving him of one of the most arduous and troublesome duties in a household—namely, that of looking after the other servants. But this position of authority did not, in my opinion, make her the less a domestic servant, and she is not thereby deprived of her right to a legacy under the terms of the testator's will.

With regard to the defendant William Bringloe the facts are not in dispute. The testator's wife, who died on Feb. 21, 1907, became aware very shortly before her death that the state of her husband's health was such as to necessitate the services of an attendant, and Bringloe, a certified male nurse, was engaged by her to look after the testator. After, and very largely in consequence of, her death the mental condition of the testator deteriorated, and in July, 1907, it became necessary to obtain the appointment of a receiver under the Lunacy Act, 1890. Down to that time Bringloe's attendances on the testator had been more or less of an intermittent nature, and, when the receiver was appointed, an arrangement was come to under which he was engaged to come to the house and be with the testator for a space of some three to five hours every day while the testator's regular attendant was resting. This arrangement was continued until November, 1910, when Bringloe's duties were changed and he became the testator's night attendant. These duties, involving a continuous attendance for twelve hours, he discharged for seven months, and at the end of that time had been brought into a state of health, mental and bodily, which necessitated his asking for a long leave of absence. This was at once granted, and I cannot doubt, if the testator had then been in a condition of health enabling him to express his wishes, that he

would have recognised the causes which had brought about the breakdown of his servant and would have felt bound to contribute to the man's maintenance during the period required for his restoration to health. The receiver was not in a position which justified him in making any such gratuitous contribution, but the leave of absence was granted on the footing that Bringloe was to resume his attendance on the testator when he was better. This he did after a rather prolonged, but not unduly prolonged, interval, and he therefore remained with the testator down to his death in April, 1912.

On these facts two points have been taken on behalf of those interested in the residue as grounds for disallowing Bringloe's claim to a legacy—the one that he was not a domestic servant and the other that, even if he was, he did not fulfil the condition of being in the employment of the testator for two years prior to his decease. I have not accepted the invitation of counsel for Bringloe to consider the various meanings attached to the word "domestic" by the dictionaries he has consulted, because, in my opinion, it is used in this context as the equivalent of the word "household." When one speaks of articles of domestic use and ornament, one means articles of household use and ornament, and in like manner a "domestic servant" is, in my opinion, a household servant as distinguished from an outdoor servant. The first question is, was this man a domestic or household servant? He was obviously a servant and a servant of the testator, and not the less so because he was possessed of qualifications which enabled him when not actually engaged with the testator to add to his income by serving others. I do not think the fact that his services were distributed between the testator and others made him less a servant of the testator. So long as he fulfilled his contract with the testator he was free to occupy his spare time as he pleased; and the contract with the testator was, in my opinion, a contract for domestic service. The relations of the servant with the employer were of the most intimate and domestic character, and the circumstances that he was not at the call of his employer continuously during the whole of each twenty-four hours, and as a general rule did not sleep in the house, cannot in my view so alter the nature of the contract as to make the servant something else than a domestic servant.

Upon the second point counsel for the residuary legatee is no doubt quite right when he says that, in order to comply with the condition attached to the bequest, it is incumbent on the servant to show that his service has been a continuous one for the period named by the testator. He cannot fulfil the condition by proving discontinuous periods of service amounting in the aggregate to two years. But, even so, that does not, I think, involve the necessity of actual daily service for the whole period. It cannot be that if, owing to ill-health or for any other reasonable cause, the servant absents himself for a time and suspends his services with the full authority and consent of the employer that the continuity of the relationship of master and servant is thereby broken. It is true that in this case in the circumstances I have mentioned no payment was made to the servant while his absence continued, but I do not think this element is of itself conclusive, coupled as it was with the arrangement that he was to return to his duties as soon as his health was restored. The result is that, in my opinion, the service of the defendant Bringloe was of such a nature as to qualify him to claim, and I think he is entitled to be paid a legacy as a domestic servant of the testator.

Solicitors: *Arthur Toovey*, for *Bennett & Co.*, Buxton; *Robinson & Bradley*; *Peacock & Goddard*, for *Gaby & Stapylton-Smith*, Hastings.

[*Reported by* W. P. Pain, Esq., *Barrister-at-Law.*]

McGREGOR *v.* TELFORD

[King's Bench Division (Lord Reading, C.J., Ridley and Scrutton, JJ.), June 21, 1915]

[Reported [1915] 3 K.B. 237; 84 L.J.K.B. 1902; 113 L.T. 84; 79 J.P. 485; 31 T.L.R. 512; 25 Cox, C.C. 1]

Bastardy—Affiliation order—Jurisdiction of justices to hear second application after dismissal of first—Effect of Criminal Justice Administration Act, 1914 (4 *& 5 Geo.* 5, *c.* 58), *s.* 37 (2).

By s. 37 (2) of the Criminal Justice Administration Act, 1914: "An appeal shall lie to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts from any order made by a court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by a court of summary jurisdiction to make such an order, or from the revocation, revival, or variation by a court of summary jurisdiction of such an order." On Mar. 11, 1915, the respondent, the mother of an illegitimate child, applied to the justices for an affiliation order against the appellant who, she alleged, was the father of her child. After hearing the evidence the justices were not satisfied that the evidence of the mother was sufficiently corroborated in "some material particular" as required by the Bastardy Laws Amendment Act, 1872, s. 4 [now s. 4 of the Affiliation Proceedings Act, 1957] and they dismissed the complaint. On April 15, 1915, a second summons was heard by the justices in which the respondent again complained that the appellant was the father of her child and asked the justices for an affiliation order against him. On this occasion the justices were satisfied with the corroborative evidence, and made an order against the appellant, who, on appeal, contended (i) that the justices had no jurisdiction to hear the second application because the matter was res judicata and (ii) that, although before the Criminal Justice Administration Act, 1914, s. 37(2) [now s. 8(1) of the Affiliation Proceedings Act, 1957] which gave the mother of an illegitimate child the right to appeal against an order of justices refusing to grant an affiliation order, the mother of an illegitimate child had a right to claim a re-hearing in bastardy provided it took place within the prescribed period of twelve months, that right was given because there was no right of appeal in such cases, and, as a right of appeal had now been given by the Act of 1914, the right of a re-hearing had been impliedly taken away by that Act.

Held: the Act of 1914 did not take away the respondent's right to a re-hearing and, therefore, the justices had jurisdiction to hear the second application.

R. v. *Machen* (1) (1849), 14 Q.B.D. 74, explained.

Notes. Section 37 (2) of the Criminal Justice Administration Act, 1914, was repealed by the Magistrates Courts Act, 1952, and re-enacted by s. 83 (4) of that Act. Section 83 (4) of the Act of 1952 was itself repealed by the Affiliation Proceedings Act, 1957, and re-enacted by s. 8 (1) of that Act.

Followed: *R.* v. *Sunderland Justices, Ex parte Hodgkinson*, [1945] 2 All E.R. 175. Referred to: *Kenney* v. *Kenney* (1925), 133 L.T. 400; *R. v. Howard, Ex parte Da Costa*, [1938] 3 All E.R. 241.

As to right to make a second application, see 3 Halsbury's Laws (3rd Edn.) 115, 116; and for cases see 3 Digest (Repl.) 446, 447. For the Affiliation Proceedings Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 86.

Cases referred to:

(1) *R.* v. *Machen* (1849), 14 Q.B.D. 74; 18 L.J.M.C. 213; 117 E.R. 29; sub nom. *Jones* v. *Machen*, 3 New Sess. Cas. 629; 3 Digest (Repl.) 446, *373*.

(2) *R.* v. *Hall and Gillespie* (1887), 57 L.T. 306; 3 T.L.R. 705; 3 Digest (Repl.) 446, *376.*

Also referred to in argument:

R. v. *Gaunt* (1867), L.R. 2 Q.B. 466; 8 B. & S. 365; 16 L.T. 379; 31 J.P. 612; 15 W.R. 1172; sub nom. *R.* v. *Grant*, 36 L.J.M.C. 89; 3 Digest (Repl.) 454, *436.*

R. v. *Glynne* (1871), L.R. 7 Q.B. 16; 41 L.J.M.C. 58; 26 L.T. 61; sub nom. *R.* v. *Flintshire Justices*, 36 J.P. 406; 20 W.R. 94; 3 Digest (Repl.) 447, *380.*

Stokes v. *Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 T.L.R. 553; 55 Sol. Jo. 690, D.C.; 27 Digest (Repl.) 712, *6796.*

Case Stated by the justices of Gateshead.

On Mar. 11, 1915, a summons was heard by the justices at Gateshead in which the respondent, Hilda Telford, a single woman, charged the appellant, James McGregor, with being the father of an illegitimate child to which she gave birth on Nov. 11, 1914, and asked for an affiliation order against him. On the hearing of the summons the justices were not satisfied that the evidence of the mother was sufficiently corroborated "in some material particular" as required by the Bastardy Laws Amendment Act, 1872, s. 4, and accordingly dismissed the complaint. On April 15, 1915, a second summons was heard before the justices, in which the respondent again charged the appellant with being the father of her illegitimate child and asked for an affiliation order against him. Upon this second occasion the justices were satisfied with the corroborative evidence adduced and made an order against the appellant. Before the hearing of the second summons it was contended on behalf of the appellant that the justices had no jurisdiction, as the case was now res judicata; that by reason of the provision of s. 37 (2) of the Criminal Justice Administration Act, 1914, the right of a re-hearing had been impliedly taken away, and that the only course open to a woman in bastardy proceedings was now the same as that in the case of a man—namely, an appeal to quarter sessions. On behalf of the respondent it was submitted that as an appeal to quarter sessions was a more costly proceeding than a re-hearing, the deprivation of the old right of re-hearing would be a practical denial of justice. It was further contended that there was no ground for suggesting that the Act of 1914 had impliedly taken away the former right. Such right could only be taken away by express provision. The justices overruled the objection of the appellant and heard the summons with the result above stated. The question for the court was whether the justices were right in law.

The Act itself came into force on Dec. 1, 1914.

Whiteley for the appellant.

Gingell, for the respondent, was not called on to argue.

LORD READING, C.J.—The question which we are called upon to decide in the present case is whether the new provision contained in s. 37 (2) of the Criminal Justice Administration Act, 1914, as to the right of appeal in affiliation proceedings on the part of the mother, has taken away from her the old right which she possessed of obtaining a re-hearing of her case by the justices after it has been once dealt with by them. If the court had been satisfied that the jurisdiction of justices to re-hear the claim of a woman for a period of twelve months, although the claim had already been dealt with, had been founded upon the fact that she did not possess the same right of appeal which a man had, it cannot be denied that there would have been much to be said for the argument put forward on behalf of the appellant. But when one comes to examine closely *R.* v. *Machen* (1), upon which the whole of the present discussion has practically been based, it will be seen that the case does not establish any such proposition. The judgment of Lord Denman, C.J., shows clearly what the true position is when a woman has

taken proceedings in bastardy and has failed. The dismissal of her application is rather in the nature of a non-suit in an action, and she is entitled, then, to come on a subsequent occasion when she is better prepared to prove her case, and if she does prove it she will obtain an affiliation order against the putative father. Apparently the real reason of the decision in *R.* v. *Machen* (1) has been misunderstood on some occasions, but the rule which it established has never been altered: see *R.* v. *Hall and Gillespie* (2). Now, it must be assumed that when the Bill of 1914 was going through Parliament the legislature knew what was the state of the existing law. If it had been intended to alter the old law, this would have been expressly carried out by the statute. But there is nothing in the Act which changes the order of things in this respect. And as there is nothing in the statute which deprives the woman of her former rights in affiliation proceedings, we must hold that they are, in fact, preserved. The appeal will, therefore, be dismissed.

RIDLEY, J.—I agree.

SCRUTTON, J.—I agree.

Appeal dismissed.

Solicitors: *King, Wigg & Brightman*, for *Frank J. Lambert*, Gateshead; *H. Wynn Parry*, Gateshead.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

Re HOWELL. Re BUCKINGHAM. LIGGINS *v.* BUCKINGHAM

[Court of Appeal (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), November 2, 3, 1914]

[Reported [1915] 1 Ch. 241; 84 L.J.Ch. 209; 112 L.T. 188]

Will—Gift to executor—Right of executor to take beneficially—Construction of will—Residue to be "at the discretion of my executor and at his own disposal."

Where an executor is given a legacy in a will it does not necessarily follow that he takes it as a trustee, with the result that he cannot claim any beneficial interest in it, unless it is shown irresistibly that he is intended to take it for his own purposes. The construction of the gift must depend on the language of the will.

A testatrix by her will appointed B. her sole executor and directed him to pay her debts and funeral and testamentary expenses. After bequeathing various pecuniary legacies including one to B. she directed that "the residue of my property (if any) shall be at the discretion of my executor and at his own disposal."

Held: the words "at his own disposal" showed that the testatrix intended that B. should take the residue beneficially and not as trustee for the next-of-kin of the testatrix.

Fenton v. *Nevin* (1) (1893), 31 L.R.Ir. 478, distinguished.

Decision of Warrington, J., [1914] 2 Ch. 173, reversed.

Notes. Distinguished: *Re Booth, Hattersley* v. *Cowgill* (1917), 86 L.J.Ch. 270; *Re Chapman, Hales* v. *A.-G.*, [1922] 2 Ch. 479. Referred to: *Re Edward's Will Trusts, Dagleish* v. *Leighton*, [1947] 2 All E.R. 521.

As to gifts of residue to executors, see 16 HALSBURY'S LAWS (3rd Edn.) 421, 422; and for cases see 24 Digest (Repl.) 950 et seq.

Case referred to:

(1) *Fenton* v. *Nevin* (1893), 31 L.R.Ir. 478.

Appeal from a decision of WARRINGTON, J., made on an originating summons taken out by the executors of one George Buckingham to determine whether upon the true construction of the will of one Jane Howell the gift of "the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal" constituted a beneficial gift in favour of George Buckingham who was sole executor and had proved the will, and if not who was entitled to the residue. WARRINGTON, J., held that George Buckingham took the residue of the estate of the testatrix in his capacity of executor and not as a beneficiary and held it for the next-of-kin of the testatrix. The representatives of George Buckingham appealed.

H. M. Broughton for the representatives of George Buckingham.

J. W. Manning for the next-of-kin of the testatrix Jane Howell.

LORD COZENS-HARDY, M.R.—I have come to the conclusion that the decision of WARRINGTON, J., cannot be supported. It is said that when a legacy is given to an executor he takes it as such. He takes it as a trustee and cannot claim any beneficial interest in it. I protest against that proposition as being far too wide. The construction of the gift must depend on the language of the particular will in question. And I do not accept the proposition that an executor cannot take a legacy for his own benefit unless it is shown irresistibly that the right conclusion must be, without any doubt whatever, that he is intended to take it for his own purposes.

Jane Howell made her will in September, 1901. She made use of a printed form which she filled up herself. So far as material the will is as follows: She appointed George Buckingham "to be the executor of this my will." Then she gave several legacies in the form of absolute gifts, and then "unto Hannah Buckingham, wife of my executor, the aforesaid George Buckingham, the sum of £20. Unto George Buckingham (my executor) the sum of £10"; and she concluded her will as follows:

> "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal."

Upon those words it is contended, and WARRINGTON, J., has so decided that George Buckingham did not take the residue at his own disposal but as a trustee and the next-of-kin take the beneficial interest. I am unable to come to that conclusion. I do not think that there is any authority which requires me to give to this will a construction which is contrary to my own opinion as to its meaning.

Several cases have been cited in which there have been two or three executors, and the property was left at the discretion of the executors; and it was held that those words negative the idea of a beneficial interest. But I know of no case which in any way applies to a case like the present, where there was no trust declared either expressly or by implication prior to the gift of residue to the executor, and there was a sole executor, and it was held that the executor did not take beneficially. It seems to me that this is really a gift to the individual whom the testatrix has several times indicated as her executor. She does not use the words "my said executor" there or anywhere else in her will. In my opinion, the words at the end of the will are not giving a direction to the executor as such to dispose of the property at his discretion, but form a gift to George Buckingham, and not the less so because the property is to be at his own disposal. In my opinion there is nothing in the Irish case of *Fenton* v. *Nevin* (1) on which WARRINGTON, J., mainly relied as covering this case which conflicts with this

view. In that case there were two executors and no words similar to "at his own disposal." On the whole I am of opinion that the decision of Warrington, J., must be reversed, and that this appeal must be allowed.

KENNEDY, L.J.—I am of the same opinion.

SWINFEN EADY, L.J.—I am of the same opinion, although the case appears to me to be one of some little difficulty. It will be observed that no trust is declared in any of the earlier parts of the will. It was urged that if this was intended to be a bequest of residue to the executor personally she would have said, "I give it to him"; that when she meant to make a direct gift she knew how to do so; and it is strange that she should have used such an involved phrase in this gift. The answer to that is that, as in many other wills, the testatrix did not use proper words because she apprehended the difficulty of expressing her meaning in legal language. In *Fenton* v. *Nevin* (1) Fitzgibbon, L.J., said (L.R.Ir. at p. 484):

> "It is plain that whatever an executor takes as such he takes as a representative, and therefore not beneficially. Accordingly, before an executor can take any part of the assets beneficially, he must show that the testator has given it to him as an individual."

In my opinion the lord justice states the law correctly. But the question is whether that has not been shown in this case. The testatrix here has superadded words to show that the gift is not only to be in his discretion as executor, but as an individual and not under any trust. It is to be at his own disposal. Those words "at his own disposal" afford the key to the construction of the gift. In my judgment those words show that he is to take beneficially. He is sole executor, and there is no question of his having to consult with other persons. The concluding words of the gift are sufficient to show that the testatrix intended that he should take beneficially. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *A. C. Dowding*, for *W. L. J. Orton*, Coventry; *Collyer-Bristow, Curtis, Booth, Birks & Langley*, for *Frederic Hall*, Folkestone.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

Re LIMOND. LIMOND *v.* CUNLIFFE

[CHANCERY DIVISION (Sargant, J.), June 22, 23, 1915]

[Reported [1915] 2 Ch. 240; 84 L.J.Ch. 833; 113 L.T. 815; 59 Sol. Jo. 613]

B

Will—Soldier's will—Actual military service—Troops remaining in zone of operations after end of war for escort duty—Testator killed by native—Validity of gift to attesting witness—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict.*, *c.* 26), *ss.* 11, 15.

The deceased was an officer in the Indian army and in 1895 was a member of an expedition engaged in frontier operations which for the purpose of the grant of war medals ended on Mar. 13, 1895. Certain troops including the deceased were, however, left behind as an escort to a party delimiting the frontier, and while with the party the deceased was mortally wounded by a fanatic. He was carried into camp and prior to his death he purported to make a will which he signed, and which was witnessed by two of his brother officers, to one of whom he made a bequest of his residuary personalty.

C

D

Held: (i) the deceased died while on actual military service within s. 11 of the Wills Act, 1837, and the will was valid as a soldier's will; (ii) the will, being a soldier's will, did not require attestation, s. 15 of the Act did not apply to a will so made, and the gift, therefore, to the attesting witness was valid.

E

Notes. Considered: *In the Estate of Grey*, [1922] All E.R.Rep. 124; *Re Wernher, Wernher* v. *Beit*, [1918] 1 Ch. 339. Referred to: *In the Estate of Rippon*, [1943] 1 All E.R. 676; *Re Priest, Belfield* v. *Duncan*, [1944] 1 All E.R. 51.

As to soldiers' wills, see 16 HALSBURY'S LAWS (3rd Edn.) 176–179; and for cases see 39 DIGEST 333 et seq., and 44 DIGEST 277. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326.

F

Cases referred to:

(1) *Emanuel* v. *Constable* (1827), 3 Russ. 436; 5 L.J.O.S.Ch. 191; 38 E.R. 639; 42 Digest 651, *585*.

(2) *Doe d. Taylor* v. *Mills* (1833), 1 Mood. & R. 288; 174 E.R. 98, N.P.; 44 Digest 276, *1084*.

G

(3) *Randfield* v. *Randfield* (1863), 2 New Rep. 309; 32 L.J.Ch. 668; 9 Jur.N.S. 842; 11 W.R. 847; 44 Digest 276, *1085*.

(4) *Wigan* v. *Rowland* (1853), 11 Hare 157; 1 Eq. Rep. 213; 23 L.J.Ch. 69; 21 L.T.O.S. 150; 17 Jur. 910; 1 W.R. 383; 68 E.R. 1229; 44 Digest 276, *1090*.

H

Also referred to in argument:

In the Goods of Saunders (1865), L.R. 1 P. & D. 16; 35 L.J.P. & M. 26; 13 L.T. 411; 11 Jur.N.S. 1027; 14 W.R. 148; 39 Digest 333, *187*.

In the Goods of Hiscock, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 17 T.L.R. 110; 39 Digest 334, *202*.

Gattward v. *Knee*, [1902] P. 99; 71 L.J.P. 34; 18 T.L.R. 163; sub nom. *In the Goods of Knee, Gattward* v. *Knee*, 86 L.T. 119; 46 Sol. Jo. 123; 39 Digest 334, *197*.

I

Adjourned Summons.

The testator, Lieut. Alexander Limond, purported to make a soldier's will according to the provisions contained in the Wills Act in the following circumstances. The testator was a lieutenant in the Indian Army, and in 1895 took part in certain frontier operations in Waziristan, which for the purpose of the grant of the war medal were regarded as having ended on Mar. 13, 1895. However,

certain troops were left behind in the Tochi Valley as an escort to the delimitation party, and were styled the "Tochi Delimitation Escort." To this escort the testator belonged, and whilst so engaged was mortally wounded by a fanatic on May 14, 1895. Prior to his death the testator made a will disposing of most of his property to his brother-in-law, Capt. Cunliffe, who, in fact, witnessed the will with a brother officer, Colonel Mein. The testator's property consisted chiefly of reversionary interests in personalty, and no steps were taken at that time as the reversions had not fallen in. This event having now happened administration with the will annexed was granted in Dec., 1914, to the plaintiff, who now took out this summons for the determination (inter alia) of whether the gift to Capt. Cunliffe, the attesting witness, was valid.

Whinney for the plaintiff.
Wright-Taylor for the executrix of Capt. Cunliffe.
Robertson-Macdonald for the next-of-kin.

SARGANT, J.—For the purpose of determining the first point on this summons it is necessary to determine whether the deceased was in actual military service within s. 11 of the Wills Act, 1837. [HIS LORDSHIP stated the facts, and continued:] It has been held in various cases that for the purpose of determining whether a soldier is in actual military service, the commencement of the military service is the time when the mobilisation takes place. In the same way it seems to me that the actual military service does not cease until the full conclusion of the operations. In the case of a great part of the force, it may well be that the actual military service ceased on Mar. 13, 1895, which was the date chosen for the grant of the war medals, although I cannot help thinking that as regards the great bulk of the force their service would be down to a somewhat later date. But in the case of this particular force, which formed part of the expedition, they remained as an escort to the delimitation party—that is to say, to the party engaged in the delimitation of the frontier, which was an operation incident to the war in question. In order that final terms of peace might be ascertained it was no doubt necessary that there should be some delimitation of the frontier, and for the purpose of effecting that delimitation a party of engineers would be told off and a portion of the force that had been fighting was retained to act as escort. In my opinion any members of that escort who were so retained had not finished the expedition on which they had been sent and were in actual military service.

Having come to the conclusion that the testator in this case died when in actual military service, I now have to consider the question whether a bequest of residuary personalty to a person who did in fact witness his will is bad under the Wills Act, 1837. The Wills Act contains a proviso in these terms:

> "Provided always, and be it further enacted that any soldier being in actual military service, or any mariner or seamen being at sea, may dispose of his personal estate as he might have done before the making of this Act."

That is in fact carrying on a similar exemption or privilege contained in s. 23 of the Statute of Frauds. Here the will in question was in fact executed in the presence of two witnesses who were present at the same time and who signed as witnesses in the presence of the testator, so that the will was a will which would have been good independently of the privilege given by s. 11 of the Wills Act; but on the other hand it seems to me reasonably clear from the evidence that that was really a matter of chance or coincidence, and that what the testator was intending to do was to make a soldier's will. In Colonel Mein's account of the transaction, as contained in the letter of June 18, 1914, he says this:

> "The regiment was at the time on active service beyond the border and the will was a soldier's will. Seeing he was in a precarious condition when brought into camp I asked him if he had made a will. On his replying in the negative I said, 'If you wish to make one and feel equal to dictating you can

make a soldier's will in the presence of two witnesses, one of whom will write down what you say' '';

and in a letter of May 15, 1895, which was written to General Limond by Capt. Cunliffe, his brother-in-law, who is a witness to the will, and a residuary legatee of the personal estate, he says this: "Before the operation began Alek asked me to write a rough will and to call Major Mein to witness and hear it dictated." So that I think that although in fact the will does fulfil the requirements of the Wills Act, still it was intended to be made as a soldier's will and in exercise of the privilege reserved by s. 11.

That being so, the question arises whether there is a disqualification under s. 15 of the Wills Act. That section is as follows:

"And be it further enacted that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person or any person claiming under such person or wife or husband, be utterly null and void."

There was a very similar provision under the statute 25 Geo. 2, c. 6, to mitigate the hardship which was found to exist under the Statute of Frauds, because a will made in the presence of a witness who took a benefit under it was held to be made in the presence of a person who was not a creditable witness and the whole will failed. The language of 25 Geo. 2, c. 6, was general, and for some time there was a conflict of opinion as to whether the provisions of that statute applied to real estate or only to personal estate, which conflict was ultimately concluded by *Emanuel* v. *Constable* (1), which held that notwithstanding the general language of the Act it must be held merely to apply to wills under the Statute of Frauds, which required to have witnesses and only applied to real estate.

The mere fact that witnesses are supernumerary witnesses does not save them from the disqualification under s. 15 if in fact they are attesting a will which is executed under the affirmative provisions of the Wills Act. That is rendered clear by a succession of cases beginning with *Doe d. Taylor* v. *Mills* (2), which was a case under 25 Geo. 2, c. 6, and followed by *Randfield* v. *Randfield* (3), and *Wigan* v. *Rowland* (4). So that the mere fact that the attestation of this will by these two witneses was superfluous, inasmuch as the testator was on active service and availing himself of the privilege of s. 11, would not be sufficient to free the witnesses from the disqualification under s. 15 if s. 15 does in fact apply at all to s. 11. In my opinion s. 15 does not so apply. It seems to me on the true reading of the statute that the disqualifications introduced by s. 15 apply to witnesses who are attesting the execution of a will under the preceding provisions of the statute, that is to say, in particular s. 9, which provides that a will shall be executed in the presence of two witnesses, who are to sign as witnesses in the presence of each other and in the presence of the testator. I think there is authority for that kind of construction of s. 15 in *Emanuel* v. *Constable* (1) which was a case under the corresponding provisions of the statute 25 Geo. 2, c. 6. In that case, which was the case that decided that the statute 25 Geo. 2, c. 6, did not extend to wills of personal estate, the Master of the Rolls says (3 Russ. at 439):

"The avowed purpose of this statute, therefore, is to remove doubts which had arisen with respect to the persons who were to be deemed good witnesses within the intent of the Statute of Frauds, which required three or four witnesses to a will of lands; and the mischief to be avoided was the admission of witnesses to such a will who were interested to support the will. When this statute, therefore, proceeds to indicate that if any person shall attest the execution of any will or codicil who shall have a gift by the will or codicil

such gift shall be void, it is a reasonable construction to say that the legislature must be understood here to be speaking of such wills or codicils as by the Statute of Frauds require to be attested by witnesses; and the indefinite words 'any will or codicil' may reasonably be read 'any such will or codicil" unless it should appear from other parts of the statute that the legislature intended to give the words 'any will or codicil' their most extended and indefinite meaning."

Here, in the same way, it seems to me that, although s. 15 speaks in the broadest terms of the attestation of the execution of any will, it is really only dealing with the attestation of the execution of a will under the provisions of the Act itself, and that the proviso (s. 11) which leaves the wills of soldiers in actual military service on their former footing, that is to say without the necessity of there being any attestation at all, prevents the application to those wills of the requirements or the disqualifications of s. 15. Of course I bear this in mind, that the disqualification under s. 15 is not a disqualification of the testator, but a disqualification of the legatee, and to that extent I cannot find any argument in the section itself for saying that it should not apply to the wills of soldiers under s. 11. The governing consideration, to my mind, is this, that s. 15 is on the true general view of the statute dealing with the execution and attestation of wills under the provisions of the statute itself, and is not dealing with the subject-matter of soldiers' and sailors' wills, which, in my opinion, are left entirely unaffected in respect of execution and attestation by the provisions of the Act.

I think that enables me to answer the question on the summons that the gifts contained in the will of the testator to Ernest William Cunliffe are valid so far as they relate to personal estate.

Solicitors: *F. M. Voules*; *Emmett & Co.*, for *Whateley Bowling*, Southsea; *Mount, Sterry & Wheeler.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re WASSERBERG. UNION OF LONDON AND SMITHS BANK, LTD. *v.* WASSERBURG

[CHANCERY DIVISION (Sargant, J.), November 3, 4, 15, 1914]

[Reported [1915] 1 Ch. 195; 84 L.J.Ch. 214; 112 L.T. 242; 59 Sol. Jo. 176]

Gift—Donatio mortis causa—Delivery of subject-matter of gift—Imperfect delivery—Box containing sealed packet of bearer bonds addressed to donee deposited with bank—Delivery of key to donee—Sufficiency of delivery of bonds.

The testator, who was about to undergo a serious operation, went to his bank which had the custody of bearer bonds belonging to him and placed them in a sealed parcel addressed to his wife. He then showed the parcel to his wife, who had accompanied him to the bank, and said: "This is yours." He then locked the parcel in a box which he left with the bank, retaining the key which he showed his wife on his bunch of keys so that she should recognise it, and gave her a list of the bonds which he told her to keep safely. On returning home the testator gave his wife the key of the box and told her to lock it up with the list of the bonds. Under his direction she locked the key

in a drawer in her room of which she always kept the key. The same day the testator went into the nursing home where he shortly afterwards died.

Held: an inchoate or imperfect delivery of chattels might be sufficient to effectuate a donatio mortis causa; by delivery of the key to his wife, thereby transferring only a partial dominion over the bonds, the testator intended to pass the dominion; and that delivery was sufficient to effectuate a donatio mortis causa.

Notes. Considered: *Re Hawkins, Watts* v. *Nash*, [1924] All E.R.Rep. 430. Referred: *Re Stoneham, Stoneham* v. *Stoneham*, [1918–19] All E.R.Rep. 1051; *Re Lillingston, Pembery* v. *Pembery*, [1952] 2 All E.R. 184.

As to gifts mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 400 et seq.; and for cases see 25 DIGEST 552 et seq.

Cases referred to:

(1) *Ward* v. *Turner* (1752), 1 Dick 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest 552, *372*.

(2) *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57; 59 L.J.Q.B. 377; 63 L.T. 153; 54 J.P. 804; 38 W.R. 588; 6 T.L.R. 296, C.A.; 25 Digest 508, *47*.

(3) *Duffield* v. *Elwes* (1827), 1 Bli.N.S. 497; 4 E.R. 959; sub nom. *Duffield* v. *Hicks*, 1 Dow. & Cl. 1, H.L.; 25 Digest 549, *351*.

(4) *Jones* v. *Selby* (1710), Prec. Ch. 300; 2 Eq. Cas. Abr. 573; 24 E.R. 143; 25 Digest 552, *374*.

(5) *Re Taylor, Taylor* v. *Taylor* (1887), 56 L.J.Ch. 597; 25 Digest 553, *376*.

(6) *Re Mustapha, Mustapha* v. *Wedlake* (1891), 8 T.L.R. 160; 36 Sol. Jo. 125; 25 Digest 553, *377*.

(7) *Hawkins* v. *Blewitt* (1798), 2 Esp. 663, N.P.; 25 Digest 554, *381*.

(8) *Bunn* v. *Markham* (1816), 7 Taunt. 224; 2 Marsh. 532; Holt, N.P. 352; 129 E.R. 90; 25 Digest 551, *363*.

(9) *Re Dillon, Duffin* v. *Duffin* (1890), 44 Ch.D. 76; 59 L.J.Ch. 420; 62 L.T. 614; 38 W.R. 369; 6 T.L.R. 204, C.A.; 25 Digest 543, *298*.

(10) *Farquharson* v. *Cave* (1846), 2 Coll. 356; 15 L.J.Ch. 137; 6 L.T.O.S. 363; 10 Jur. 63; 63 E.R. 768; 25 Digest 552, *370*.

(11) *Powell* v. *Hellicar* (1858), 26 Beav. 261; 28 L.J.Ch. 355; 5 Jur.N.S. 232; 7 W.R. 171; 53 E.R. 898; 25 Digest 554, *389*.

(12) *Reddel* v. *Dobree* (1839), 10 Sim. 244; 59 E.R. 607; sub nom. *Riddell* v. *Dobree*, 3 Jur. 722; 25 Digest 554, *382*.

(13) *Treasury Solicitor* v. *Lewis*, [1900] 2 Ch. 812; 69 L.J.Ch. 833; 83 L.T. 139; sub nom. *Re Dash, Treasury Solicitor* v. *Lewis*, 48 W.R. 694; 16 T.L.R. 559; 25 Digest 552, *371*.

(14) *Re Johnson, Sandy* v. *Reilly* (1905), 92 L.T. 357; 49 Sol. Jo. 314; 25 Digest 553, *379*.

Also referred to in argument:

Re Beaumont. Beaumont v. *Ewbank*, [1902] 1 Ch. 889; 71 L.J.Ch. 478; 86 L.T. 410; 50 W.R. 389; 46 Sol. Jo. 317; 25 Digest 542, *292*.

Adjourned Summons to determine whether a testator shortly prior to his death made an effective donatio mortis causa to his wife of certain bearer bonds.

Grant, K.C., and *J. Samuel Green* for the plaintiffs.

Romer, K.C., and *J. G. Wood* for Mrs. Wasserberg, widow of the testator.

Martelli, K.C., and *Sherington* for the infant defendants.

Henderson for J. Wasserberg.

Cur. adv. vult.

Nov. 16, 1914. **SARGANT, J.,** read the following judgment: The first question raised by this summons, and the only question on which I have reserved judgment, is whether the testator shortly prior to his death made an effective donatio mortis causa to his wife of a number of bearer bonds of the value of some £19,000.

The facts appear from the affidavits supplemented by a statement or admission which was made to me in the course of the proceedings, and in which both the executors and the widow concurred. It seems that the testator, who was worth at his death from £80,000 to £90,000, exclusive of the bearer bonds now in question, kept two boxes of deeds or securities at his bankers, the Holborn branch of the Union of London and Smiths Bank, Ltd. One box, which I will call the first box, could only be opened by the testator; it is referred to in the affidavits as the locked box; it contained private papers, deeds, and securities, but the bank had no definite knowledge of its contents. The other box, which I will call the second box, contained both bearer bonds and other securities belonging to the testator and could be and was from time to time opened by the bank for the purpose of collecting coupons for the testator; the bank had in their ledger a detailed list of the contents of this box. The testator had been unwell for a long time, and had been under a specialist for about six months before his death. He was in fact suffering from cancer, but he was not aware of the fact until about Jan. 19 or 20, 1914, when arrangements had to be made for him to be taken to a nursing home for the purpose of undergoing a serious operation. On Tuesday, Jan. 20, the testator called on the plaintiff Lewis Barnett, informed him of the impending operation and asked him to act as a trustee of his will, and on the following day the testator discussed with Mr. Lewis Barnett the terms of his will and the provisions to be made for his relatives and for winding-up his affairs in the event of the operation ending fatally. At this interview Mr. Lewis Barnett says that the testator stated his intention to give his wife a large sum either in money or in bearer shares so that if he got over the operation she might have ample means to defray all household and personal expenses without troubling him as he intended, if and when he was well enough, to go to South Africa for at least a year. The testator also called on Mr. Lewis Barnett on the two following days. On the Thursday he stated that he was going to see his solicitors and make his will, and that he was also going to the bank to go through his securities and look out the bearer shares which he was going to give to his wife. And at the call on Friday, which took place at 1 p.m., and at which he was accompanied by his wife, the testator stated that he had been to the bank and had put the bearer securities in an envelope for his wife and had put her name outside.

The testator did in fact go to his bank on the Thursday accompanied by a friend of his, a Mr. Klean, and saw the then manager, Mr. Langdon, and stated to him that he was about to undergo a serious operation, and that he wished to know if he could transfer his bonds to his wife. Mr. Langdon explained to the testator that he could do as he liked with his bonds, but that if he died within three years the bonds would still be liable to death duties, and made the suggestion that the testator might, in order to carry out his wishes, place the bonds in a sealed parcel addressed to his wife. At some time in the course of that afternoon, but whether before or after the interview with Mr. Langdon does not appear, the testator saw Mr. Thomas, the securities clerk at the bank, and said he was coming on the following morning to take away his bonds. On the next day, the Friday, the testator called alone at the bank between midday and 1 p.m. and saw Mr. Watson, the then assistant manager. In anticipation of the visit, the second box had been brought up from the bank's strong room and a list of the bearer securities got out from the ledger and entered in the journal. The second box was brought into the room by Mr. Thomas, and the testator signed the journal and was handed the securities. He then asked for and was handed some brown paper, string, and sealing wax, and proceeded to fasten up the securities in the brown paper, and to tie up and seal the parcel. The testator then said to Mr. Watson that he was going to deposit the parcel with the bank in the name of his wife, to which Mr. Watson replied that if he did this then, in the event of his operation being successful, the parcel could only be removed by his wife, who would be the only person regarded by the bank as having any control of it. The testator said that

was not his intention, and, after considering for a moment or so, added: "I shall put her name on the outside of the parcel and lock it up in my locked box so that when my executors open it they will hand over the parcel to her." The testator then wrote on the parcel: "This is the property of Mrs. F. E. Wasserberg," and asked for his locked box—the first box—which was brought to him. Just after this the testator's wife, who had followed him to the bank, came into the room, and the following incident took place between them: The testator showed his wife the parcel and said: "This is yours." She called his attention to the fact that in the indorsement her initials had been reversed, and he then drew a line under her name on the indorsement, and wrote "Ethel F. Wasserberg" underneath and added his initials. Neither Mr. Watson nor Mr. Thomas was a party to the incident or noticed it. The testator then put the parcel into the first box, locked it and left it at the bank, retaining the key. He also showed his wife on his bunch of keys which was the key of the first box, so that she should recognise it. And he handed a list of the bearer bonds to his wife and bid her to keep it safely. The testator and his wife then left the bank and proceeded along Holborn to see Mr. Barnett, and while on the way there the testator told his wife to get the parcel out of the box at the bank and to put it in her own bank, which was another branch of the same bank at Swiss Cottage. After lunching in the neighbourhood they went back to the testator's office, where he signed his will, and shortly before 4 p.m. they returned to the testator's bank in Holborn, where he asked for the first box, opened it and placed the will there inclosed in a sealed envelope. They then drove back to their home at Hampstead, and on the way Mrs. Wasserberg said, "We might have brought that parcel with us and left it at my bank on the way," adding "No, it would be closed." The testator said the parcel would be all right where it was; that his wife had only to go and ask the manager for it and put it in her bank at some later time. He also said that he did not wish her to take the bearer securities home, probably alluding by this to the fact that they had no safe there. On arriving home the testator told his wife to lock up the list which he had given her of the securities, and gave her the bunch of keys containing the keys of the first box, and told her to lock them up also. Accordingly she, under his direction, locked both the list and the bunch of keys in a drawer in her own room, of which she had and always kept the key. He did not then give her the rest of his keys. They were afterwards given her at the nursing home, as he said he would not be wanting them there. He went to the nursing home that same evening, and remained there until his death on the following Wednesday, Jan. 28.

On these facts the validity of the transaction as a donatio mortis causa has been questioned on two grounds: first, that a gift was intended in all events, and not merely in the event of death, and that such gift was not completely effected; and, secondly, that even if the intention was merely to make a donatio mortis causa, there was no sufficient delivery to make it effective even for that purpose. The first objection was rested mainly on the conversation with Mr. Lewis Barnett on Tuesday, Jan. 20. But I am inclined to think that that conversation did not disclose the whole or even the main object of the testator, but merely recognised an incidental convenience of the proposed arrangement if the testator recovered; and that, had this happened, the testator's wife would have held the bonds not as her absolute property, but as his agent. And even if this is not a true view of the testator's intention on Jan. 20, I am quite satisfied that he altered that intention in the course of the next day or two, and that later on he had a quite clear and definite intention to provide with these bonds for his wife in the event, and in the event only, of his death; and that alternatively he meant by means of the delivery of the key to put the bonds at her disposal and under her dominion, though, in fact, this really important intention was not fully carried out by reason of the fact that the possession of the key would not have been enough for the bank to act on. The question, both on the facts of the particular case and in

view of the general law, is whether there was any sufficient delivery of the bonds to give effect to the intended gift. It is pointed out by LORD HARDWICKE, L.C. in *Ward* v. *Turner* (1) that donationes mortis causa fell into two classes. There is first the class of cases in which a complete delivery or transfer takes place such as would be sufficient in the case of an ordinary gift and as in the case of a donatio mortis causa would necessitate a retransfer to the donor should he recover. And there is also, as regards some kinds of property at all events, a second class of cases in which the transaction is sufficiently effected by an inchoate or incomplete delivery or transfer such as would not be sufficient in the case of an ordinary gift and, as in the case of an intended donatio mortis causa, requiring something further to be done by the legal personal representatives of the donor after his death. Accordingly I have to consider the matter under each of these alternative heads. On doing so, I cannot think that the facts are sufficiently strong in the claimant's favour to bring the case within the first of the above two alternatives. As regards the incident at the bank, the case of *Cochrane* v. *Moore* (2) shows that mere words of gift are not in themselves sufficient, but there must be delivery. If the testator had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody that would probably have been enough. But as it is, the facts are, I think, that the testator did not at any time during that incident part with the custody of the bonds. Again, as regards the subsequent delivery of the key, I cannot think that this was a sufficient delivery to pass the bonds by way of ordinary gift. It would seem that the delivery of a key might be sufficient if the subject-matter of the gift were bulky goods in a warehouse which could not be actually delivered. But here not only was the subject-matter of the gift eminently portable property, but the delivery of the key did not in itself enable the recipient to get at the bonds since the bank would not (as the testator must have known, at any rate after his conversation with Mr. Watson) have allowed Mrs. Wasserberg to have access to the box without some further authority from the testator.

As regards the second alternative, I am again of opinion that, as far as the incident at the bank went, there was nothing sufficient to constitute an enforceable donatio mortis causa. Not only was there no complete delivery, but there does not seem to have been any attempt, however inchoate or incomplete, at any delivery at all. There were merely words of gift coupled with a careful indication for future guidance of what the property consisted of, where it was to be found, and how it was to be got at. But, on the other hand, the handing over of the key later in the day went much further than this. On that occasion there was a transfer to Mrs. Wasserberg of part of the means of getting at the bonds, of a partial dominion over them, and there was of course a corresponding depreciation of the testator's facilities for dealing with them. Was this partial or inchoate delivery or transfer a sufficient delivery to effectuate a donatio mortis causa? In my judgment that question must be answered in the affirmative, both on principle and (what perhaps is more important in so anomalous a branch of law as this) on actual authority. It was urged very strenuously by counsel for the infant defendants that in the case of chattels such as these bonds there must either be complete delivery on the one hand or non-delivery on the other, and that there was no half-way house such as was recognised by *Duffield* v. *Hicks* (3) in the case of mortgage debts by means of the delivery of the mortgage deeds and has since been recognised in the case of money on deposit or policies of insurance amongst other property by virtue of the delivery of the deposit notes or other indicia of title. But after most careful consideration I see no reason in principle why this should be so. When it is once admitted that any property is a possible subject-matter for a donatio mortis causa—and in fact chattels of all kinds were much more obviously and readily within this category—I can see no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other. The requirement

that there should be some act towards a gift or transfer avoids equally in both classes of property the dangers attaching to mere nuncupative legacies which were guarded against by the Statute of Frauds, 1677, the predecessor in this respect of the Wills Act, 1837, and there is no reason in the nature of things why chattels as well as choses in action should not be in such a position that there should be some physical thing the possession of which should be required in order to get at the property, and the transfer of which should accordingly amount to a transfer of the means or part of the means of getting at the property.

As to authority, *Jones* v. *Selby* (4) was a clear decision by the Master of the Rolls that the delivery of the key of a trunk with words of gift of the trunk and its contents was a good donation mortis causa of a Government tally for £500 inside the trunk, although the trunk itself was retained by the donor. And the propriety of this decision in law was approved by LORD HARDWICKE, L.C., in *Ward* v. *Turner* (1) though the actual decision had been reversed by LORD COWPER, L.C., because the evidence was not sufficient to show that the tally formed part of the contents of the trunk at the time of the gift. Again, in *Re Taylor* (5) the testator in his last illness showed his daughter a deposit note and told her it was to be hers in the event of his death. She placed it by his directions for safe custody in a cashbox which was kept in his bedroom, but she retained the key. This was held a good donatio mortis causa of the money, and this decision necessarily involved holding that the parting with the possession of the key constituted a sufficent delivery of the contents of the cashbox since, unless the deposit note itself had been sufficiently transferred, there could not have been any sufficient transfer of the money represented by it. And, again, in *Re Mustapha* (6) MATHEW, J., when sitting in the Chancery Division, held the delivery of a key of a wardrobe sufficient to pass for this purpose part of the contents of a safe, the key of which was in the wardrobe. In opposition to these express decisions a number of cases were referred to, but I cannot find that any one of them really negatived the proposition that an inchoate or imperfect delivery of chattels might be sufficient for the present purpose. In *Hawkins* v. *Blewitt* (7) LORD KENYON, C.J., held that there was no real continuing intention to give, and the key of the trunk whose contents were claimed had been redelivered to the alleged donor before his death. In *Bunn* v. *Markham* (8) both the key and the box had been retained by the testator. And it may be further remarked that in both the last-mentioned cases, as the action was one at law, effect could hardly be given to a donatio mortis causa of the class that is now being considered, where it is sought on the principle developed in *Re Dillon* (9) to complete in equity a gift which is incomplete in law. Turning now to decisions given by the courts of equity, *Farquharson* v. *Cave* (10) and *Powell* v. *Hellicar* (11) were both cases where delivery was merely to an agent of the donor, and was therefore not really a delivery at all. In *Reddel* v. *Dobree* (12) the donor kept the key of the box in question, and was expressly found by the court to have intended to retain absolute power and dominion over the contents of the box. And in *Treasury Solicitor* v. *Lewis* (13) STIRLING, J., found as a fact that the testatrix did not intend to make a donatio mortis causa at all, but intended that the articles in question should be dealt with as part of the property which she meant to dispose of at her death, and over which she meant to reserve dominion during her life. *Re Johnson* (14), again, was a case where there was a retention of the key, and FARWELL, J., held that there was no intention on the part of the testatrix not to part with dominion over the box. In the present case I think that when the testator handed the key to his wife he intended to part with dominion over the box which I have called the first box, and it may be incidentally remarked that in both *Re Mustapha* (6) and *Re Johnson* (14), and, indeed, in all the cases above referred to, extreme importance has always been attached to the possession of the key of any receptacle in which the articles claimed by way of donatio mortis causa may have been placed—a possession which in the present case passed to the widow.

On the whole, therefore, I have come to the conclusion that there is no such absolute rule as has been contended for, and that the widow, Mrs. Wasserberg, has established her case and is entitled to the bonds in question.

Order accordingly.

Solicitors: *H. H. Wells & Sons*; *Stevens, Sons & Parkes*; *Ray, Jackman & Falck.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re DRUMMOND. ASHWORTH *v.* DRUMMOND

[CHANCERY DIVISION (Eve, J.), March 25, 26, 1914]

[Reported [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 30 T.L.R. 429; 58 Sol. Jo. 472]

Charity—Benefit to community—Relief of poverty—Gift in will for contribution to workpeople's holiday fund.

Will—Gift to club for old boys of school—Discretion of committee as to application—Validity of trust.

By his will the testator bequeathed shares in a company of which he had been a director to trustees on trust to pay the income thereof to the directors for the purposes of contributing to the holiday expenses of the workpeople employed in the spinning department of the company in such a manner as a majority of the directors should in their absolute discretion think fit and the directors were empowered to divide the income equally or unequally between such workpeople. After making other bequests the testator directed that the residue of his estate be held on trust for sale and conversion and that the proceeds of sale be held on trust for the Old Bradfordians' Club, London (being a club for old boys of Bradford Grammar School), to be used as the committee of the club should think best in the interests of the club or school. In the spinning department of the company upwards of 500 workpeople, mostly girls, were employed at an average weekly wage of 15s. and twelve workpeople, who acted as overseers, at 36s. to 37s. a week. The workpeople could, at their option, subscribe to a holiday expenses fund which was supplemented by contributions from the company.

Held: (i) as the company's workpeople could not be regarded as poor people within the statute of Elizabeth and as the trust was one for private individuals and not one for general public purposes, the trust for the spinning workpeople of the company was not charitable and was void as infringing the rule against perpetuities; (ii) the residuary gift imposed a trust that the money should be expended at the discretion of the committee of the club in the best interests of the school and club in the direction indicated in the will, and such a trust was valid and did not tend to perpetuity.

Notes. The preamble to the repealed Statute of Elizabeth (1601) (43 Eliz. 1, c. 4) was preserved in s. 13 of the Mortmain and Charitable Uses Act, 1888, see 2 HALSBURY'S STATUTES (2nd Edn.) 916, now repealed by s. 38 of the Charities Act, 1960, see 40 HALSBURY'S STATUTES (2nd Edn.) 168.

Considered: *Re Rayner, Cloutman* v. *Regnart* (1920), 89 L.J.Ch. 369. Applied: *Re Wernher's Charitable Trust (Trustees)* v. *I.R.Comrs.*, [1937] 2 All E.R. 488. Followed: *Re Price, Midland Bank Executor and Trustee Co.* v. *Harwood*, [1943] Ch. 422. Considered: *Re Hobourn Aero Components Ltd.'s Air Raid Dis-*

tress Fund, *Ryan* v. *Forrest*, [1946] 1 All E.R. 501; *Gibson* v. *South American Stores* (*Gath and Chaves*), *Ltd.*, [1949] 2 All E.R. 985; *Oppenheim* v. *Tobacco Securities Trust Co.*, [1951] 1 All E.R. 31; Leahy v. A.-G. of New South Wales, [1959] 2 All E.R. 300. Referred to: *Re Taylor*, *Midland Bank Executor and Trustee Co.* v. *Smith*, [1940] Ch. 481; *Re Macauley's Estate*, *Macauley* v. *O'Donnell*, [1943] Ch. 435, n.; *Re Compton*, *Powell* v. *Compton*, [1945] 1 All E.R. 198; *Williams' Trusts Trustees* v. *I.R.Comrs.*, [1945] 2 All E.R. 236; *Re Scarisbrick's Will Trusts*, *Cockshott* v. *Public Trustee*, [1951] 1 All E.R. 822; *Re White's Will Trusts*, *Tindall* v. *United Sheffield Hospitals*, *Board of Governors*, [1951] 1 All E.R. 528; *Re Astor's Settlement Trusts*, *Astor* v. *Scholfield*, [1952] 1 All E.R. 1067; *Re Koettgen*, *Westminster Bank*, *Ltd.* v. *Family Welfare Association Trustees*, *Ltd.*, [1954] 1 All E.R. 581; *I.R.Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525.

As to public benefit being a requisite element of charity; Non charitable purposes, gift for benefit of individuals; Gift for association and perpetual institution; see 4 HALSBURY'S LAWS (3rd Edn.) 209, 233, 236; and for cases see 8 DIGEST (Repl.) 320, 355.

Case referred to:

(1) *Re Clarke*, *Clarke* v. *Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811; 49 W.R. 628; 17 T.L.R. 479; 45 Sol. Jo. 484; 8 Digest (Repl.) 356, *352*.

Also referred to in argument:

Re Clark's Trust (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 355, *343*.

Cunnack v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, *344*.

Braithwaite v. *A.-G.*, [1909] 1 Ch. 510; 78 L.J.Ch. 314; 100 L.T. 599; 73 J.P. 209; 25 T.L.R. 333; 8 Digest (Repl.) 355, *345*.

Re Macduff, *Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

A.-G. v. *Duke of Northumberland* (1877), 7 Ch.D. 745; 47 L.J.Ch. 569; 26 W.R. 586; varied (1878), 38 L.T. 245, C.A.; 8 Digest (Repl.) 410, *1020*.

Re Gassiot, *Fladgate* v. *Vintners' Co.* (1901), 70 L.J.Ch. 242; 17 T.L.R. 216; 8 Digest (Repl.) 357, *358*.

Income Tax Special Purposes Comrs. v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

Re Dudgeon, *Truman v. Pope* (1896), 74 L.T. 613; 12 T.L.R. 465; 8 Digest (Repl.) 317, *35*.

Re Elliott, *Raven* v. *Nicholson* (1910), 102 L.T. 528; 54 Sol. Jo. 426; 8 Digest (Repl.) 317, *36*.

Re Mann, *Hardy* v. *A.-G.*, [1903] 1 Ch. 232; 72 L.J.Ch. 150; 87 L.T. 734; 51 W.R. 165; 8 Digest (Repl.) 344, *257*.

Re Gosling, *Gosling* v. *Smith* (1900), 48 W.R. 300; 16 T.L.R. 152; 44 Sol. Jo. 196; 8 Digest (Repl.) 320, *49*.

Goodman v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 8 Digest (Repl.) 440, *1306*.

Re Wall, *Pomeray* v. *Willway* (1889), 42 Ch.D. 510; 59 L.J.Ch. 172; 61 L.T. 357; 37 W.R. 779; 8 Digest (Repl.) 319, *43*.

Re Christchurch Inclosure Act (1888), 38 Ch.D. 520; 57 L.J.Ch. 564; 58 L.T. 827; 4 T.L.R. 392, C.A.; affirmed, [1893] A.C.1, H.L.; 8 Digest (Repl.) 384, *776*.

Re Good, *Harington* v. *Watts*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 53 W.R. 476; 21 T.L.R. 450; 49 Sol. Jo. 445; 8 Digest (Repl.) 347, *278*.

Re Nottage, *Jones* v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370*.

Cocks v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 325, *86.*

Re Delany, Conoley v. *Quick*, [1902] 2 Ch. 642; 71 L.J.Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest (Repl.) 325, *89.*

Thomson v. *Shakespear* (1859), John. 612; 29 L.J.Ch. 140; 1 L.T. 398; 24 J.P. 243; 6 Jur.N.S. 118; 8 W.R. 124; affirmed (1860), 1 De G. F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.JJ.; 8 Digest (Repl.) 358, *364.*

Carne v. *Long* (1860), 2 De G. F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 6 Jur.N.S. 639; 8 W.R. 570; 45 E.R. 550, L.C.; 8 Digest (Repl.) 437, *1278.*

Re Dutton, Ex parte Peake (1878), 4 Ex.D. 54; 48 L.J.Q.B. 350; 40 L.T. 430; 27 W.R. 398; sub nom. *Re Dutton, Ex parte Tunstall Athenæum Trustees*, 43 J.P. 6; 8 Digest (Repl.) 437, *1281.*

Langham v. *Peterson* (1903), 87 L.T. 744; 67 J.P. 75; 19 T.L.R. 157; 8 Digest (Repl.) 394, *868.*

Re Amos, Carrier v. *Price*, [1891] 3 Ch. 159; 60 L.J.Ch. 570; 65 L.T. 69; 39 W.R. 550; 7 T.L.R. 559; 8 Digest (Repl.) 437, *1283.*

Re Smith, Johnson v. *Bright-Smith*, [1914] 1 Ch. 937; 83 L.J.Ch. 687; 110 L.T. 898; 30 T.L.R. 411; 58 Sol. Jo. 494; 8 Digest (Repl.) 338, *200.*

Hancock v. *Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 50 W.R. 321, H.L.; 37 Digest 105, *397.*

Adjourned Summons.

By his will, dated Nov. 24, 1911, the testator James Drummond, of Brook Lodge, Ilkley, in the county of York, a director of James Drummond & Sons, Ltd., appointed the three plaintiffs and another executors and trustees thereof, and after making certain devises and bequests, bequeathed to his trustees 1,700 of his preference shares in the company upon trust as to 500 thereof to pay the income to arise therefrom to the directors of the company for the purposes of contributing to the holiday expenses of the workpeople employed in the spinning department of the company in such manner as a majority of the directors should in their absolute discretion think fit, and the testator declared that the directors might divide the same equally or unequally between such workpeople or some of them only as they should in their absolute discretion think fit, and if the company should at any time be wound up then the testator directed the trustees to pay the money received by them in respect of the 500 preference shares to the governors of the Bradford Grammar School upon trust as mentioned in the will. The testator then dealt with the remaining 1,200 preference shares, and after certain further bequests directed that the residue of his estate be held on trust for sale and conversion and that the proceeds of sale be held on trust for the Old Bradfordians' Club, London (being a club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees.

By a codicil to his will, dated Dec. 2, 1911, the testator declared that he desired that the moneys should be utilised by the club for such purposes as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a clubhouse for the use of the members, being old boys of the Bradford Grammar School, with power to the committee to make rules and regulations as to residence in or use of the same, and, further, that it was the object of the bequest that the moneys should be utilised in founding scholarships or otherwise in such manner as the committee for the time being should think best in the interests of the club or the school.

The testator died on Dec. 6, 1911, and his will with the codicil thereto was

duly proved by the plaintiffs as the executors thereof, the other executor having renounced probate. The company James Drummond & Sons, Ltd., continued to carry on business as worsted spinners and manufacturers.

In the company's spinning department there were some 400 to 500 workpeople, chiefly girls, whose average weekly wages were 15s., and some twelve overseers, who also worked in the department and whose wages were from 36s. to 37s. a week. For some years past there had been a holiday fund to which the operatives could contribute, and these funds were supplemented by contributions from the company. The Old Bradfordians' Club was founded in 1899 to encourage social intercourse amongst the old boys of the Bradford Grammar School, and had been managed by a committee elected by the members of the club. On Jan. 3, 1913, the Old Bradfordians Club (London), Ltd., was registered under the Companies (Consolidation) Act, 1908, for the purpose of taking over the assets and property of the club, and with objects similar to those of the club, the management of the Old Bradfordians' Club as registered being vested in the committee.

An originating summons was taken out on Dec. 3, 1913, by the trustees of the will to determine whether the gift of shares to contribute to the holiday expenses of the workpeople was valid; and whether the residuary gift to the Old Bradfordians Club was valid.

Andrewes-Uthwatt for the trustees.

Clayton, K.C., and *Howard Wright* for John Drummond, heir-at-law of the testator.

J. E. Harman for the directors of the company.

Dighton Pollock for the governors of Bradford Grammar School.

Austen-Cartmell for the Attorney-General.

EVE, J., stated the facts and continued: The question which I have to determine is whether a bequest by the testator in the following terms is a good charitable bequest:

> "I bequeath to my trustees 1,700 of my preference shares of £10 each in James Drummond & Sons, Ltd., upon trust as to 500 thereof to pay the income to arise therefrom to the directors of James Drummond & Sons., Ltd., for the purposes of contribution to the holiday expenses of the workpeople employed in the spinning department of James Drummond & Sons, Ltd., in such manner as a majority of the said directors shall in their absolute discretion think fit, and I declare that the said directors may divide the same equally or unequally between such workpeople, or some of them only, as they shall in their absolute discretion think fit."

It has been argued, first, that although there is nothing expressed in the bequest as to the poverty of the recipient, or as to his or her inability to take a holiday without the assistance of the contribution thereby contemplated, I ought to infer from the form of the bequest that there was thereby imposed upon the directors a trust so to exercise their discretion as to make contributions only in those cases in which the operative would have been unable to take a holiday, or to contribute his or her quota to the holiday expenses fund without the assistance of the contribution, and, secondly, that the whole class of people employed at a weekly wage of 15s. is a class of persons who may properly be described as poor people within the statute of Elizabeth [(1601) 43 Eliz. 1, c. 4]. I do not think I can place that construction on the gift, or accede to either of these views. I think that what the testator really contemplated was the provision of a fund by the income of which the contributions theretofore made by the company should be continued, and that there is nothing in this bequest or in the terms in which the discretion is given to the directors which imposes upon them the obligation of inquiring into the ability of the participants to provide themselves with a holiday without assistance or limits their powers of contribution to cases where no holiday would be possible without such contribution. Neither can I hold judicially that

a large body of people working at what does indeed seem to be a very small wage can properly be regarded as being reduced to such a condition of poverty as to be described as poor people within the meaning of the statute.

Then it is said that, even if that be the case, the gift is still a good charitable gift because it is a gift for general public purposes, intended for the benefit of a particular section of the public, and is within the principles underlying that class of case in which a good charitable trust has been held to be created, not for all the inhabitants of any particular town, village, or borough, but for a particular, and very often a small, section of those inhabitants, such, for example, as a trust for the benefit of those possessing certain qualifications, as freemen of a borough, or residing in certain tenements, or constituting a particular class, such as widows or aged persons. If I could see my way to uphold the gift on that line of authority, I should be very pleased to do so, because undoubtedly the dividing line is a very fine one. Counsel for the Attorney-General has contended that the trust is wholly a trust for public purposes, the securing of a holiday for a large body of the inhabitants of this particular town and the benefit thereby of the general health of the community; that it only differs from the cases on which he relied in that it fixes the qualification, not with reference to any particular place of residence or to the possession of any particular franchise, but with reference to employment in a particular business, and a particular department in that business, and he contends that, if a public trust can be created for the occupiers for the time being of a few small cottages in a Hampshire village, a similar trust can be created for the large aggregation of persons constituting for the time being the employees in some of these great industrial undertakings. I think the answer to that argument has been supplied by counsel for the heir-at-law in his reply. The distinction lies in this: The present case is not a trust for general public purposes, it is a trust for private individuals, a fluctuating body of private individuals it is true, but still private individuals, and there is nothing in the nature of a public trust. That being the case it is outside the line of authorities cited, and not being for public purposes I am constrained to hold that it is not charitable, but void as infringing the rule against perpetuities. It is not disputed that on this finding the alternative gift to the grammar school must also fail.

The question as to the validity of the residuary gift in favour of the Old Bradfordians' Club was then argued.

Maugham, K.C., and *C. Hartree* for the Old Bradfordians' Club (London), Ltd.

Clayton, K.C., and *Howard Wright* for the heir-at-law and next-of-kin of the testator.

EVE, J.—The testator by his will, after making certain devises and bequests, devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees for sale and conversion and, subject to certain payments therein mentioned, to stand possessed of the residue of the moneys produced by such sale and conversion upon trust for the Old Bradfordians' Club, London.

In a codicil made a few days after making this will the testator introduced a number of express provisions affecting the residuary bequest, and the effect of the will and codicil taken together is such that I think there is a great difficulty in arriving at the conclusion that the testator intended that the members of the club should divide this residuary bequest amongst themselves as individuals. Counsel for the club has contended that that is the effect of the codicil, but I think the codicil does mean more than the mere expression of the testator's desire, and is to some extent a trust. It is a trust for the benefit of the Bradford Grammar School and the Old Bradfordians' Club. The testator specifies in the codicil the purposes to which he desires his money should be devoted. One of these objects was that the committee should acquire premises to be used as a club-house for the use of the members of the club; another purpose which the testator had in view was the foundation of scholarships for the benefit of the club or the

school. It is said that such gifts tend to or savour of a perpetuity. I think that on the true construction of this will and codicil the testator's intention was that the moneys were to be received for those purposes specified in the codicil, and, if that is the true construction, there would no doubt be great difficulty in holding a gift to be valid which infringed on the rule against perpetuities. A

In my opinion, however, that is not the substantial meaning of this will and codicil. On the assumption that those specific matters were the objects of the testator's intention, they were objects which the testator leaves not merely to the discretion of the committee—his intention is to be carried out. There is, therefore, in my opinion, a trust to apply the moneys to such purposes as the committee of the club may determine to be for the benefit of the old boys of the Bradford Grammar School or the members of the Old Bradfordians' Club. In other words, he empowers the committee to deal with this property so long only as they apply it in the direction indicated in his codicil. It is not, however, such a trust as would render the legacy void as tending to a perpetuity, and there are numerous authorities to support that view, amongst others, *Re Clarke*, *Clarke* v. *Clarke* (1). In the course of his judgment BYRNE, J., lays down the law in these words ([1901] 2 Ch. at p. 114): B C D

> "It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be: Will the legacy, when paid, be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which, by the terms of the gift, or by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad." E

Counsel for the heir-at-law has argued that the testator's intention as disclosed in the codicil is that he will not permit the money to be divided amongst the members of the club. The words in the codicil are these: F

> "I desire that the said moneys shall be utilised by the club for such purposes as the committee for the time being may determine, the object and intent of this my bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a club house for the use of the members, being old boys of the Bradford Grammar School, with power to the committee to make rules and regulations as to residence in or use of the same, and further it is the object of this my bequest that the said moneys shall be utilised in founding scholarships, or otherwise in such manner as the committee for the time being shall think best in the interests of the club or school." G H

It appears to me that the testator contemplated two things. First, he intended absolute gifts to the association; secondly, he contemplated a trust which would still allow the committee to spend the trust moneys in such a manner as they in their discretion might think best in the interests of the school and club, subject, however, to the guidance of the testator's directions. The manner in which the moneys are to be expended rests with the treasurer of the club acting through the committee of the club, subject to the trust imposed by the testator. The particular application of the moneys will depend on the discretion of the committee in promoting the benefit of the legatees not individually, but as an association. I think counsel for the club is right when he says that in a case of this sort you must consider the character of the legacy. There is, in my opinion, a trust, but not such a trust as would render the legacy void as tending to a perpetuity. I I

declare, therefore, that there is a valid gift to the club for such purposes as the committee shall determine for the benefit of the old boys or members of the club.

Order accordingly.

Solicitors: *Blundell, Gordon & Co.*, for *Gordon, Hunter & Duncan*, Bradford; *Kingsford, Dorman & Co.*, for *Vint, Hill & Killick*, Bradford; *Speechly, Mumford & Co.*, for *Mumford, Johnson & Co.*, Bradford; *J. Moverley Sharp*; *Treasury Solicitor.*

[*Reported by* W. GRIST HAWTIN, ESQ., *Barrister-at-Law.*]

SMITH AND ANOTHER *v.* SELWYN

[COURT OF APPEAL (Kennedy, Swinfen Eady and Phillimore, L.JJ.), April 7, 1914]

[Reported [1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195]

Practice—Action based on felonious act—Need to prove prior prosecution of defendant, or reasonable excuse if none—Stay of proceedings in absence of proof.

An action for damages based upon a felonious act committed against the plaintiff by the defendant is not maintainable until the latter has been prosecuted or a reasonable excuse has been given why a prosecution has not taken place, and the duty of the court in such a case is to stay the proceedings in the action until the defendant has been prosecuted.

Notes. Considered: *Admiralty Comrs.* v. *Steamship Amerika* (*Owners*), [1917] A.C. 38; *Yardy* v. *Greenwood* (1935), 79 Sol. Jo. 363; *In the Estate of G., M.* v. *L.*, [1946] P. 183. Referred to: *Canvey Island Comrs.* v. *Preedy* (1921), 91 L.J.Ch. 203; *Jack Clark* (*Rainham*), *Ltd.* v. *Clark*, [1946] 2 All E.R. 683; *Fowler* v. *Lanning*, [1959] 1 All E.R. 290.

As to actions in respect of felonious torts, see 1 HALSBURY'S LAWS (3rd Edn.) 11 et seq.; and for cases see 1 DIGEST (Repl.) 76, 77.

Cases referred to:

(1) *Osborn* (*Osborn*) v. *Gillett* (1873), L.R. 8 Exch. 88; 42 L.J.Ex. 53; 28 L.T. 197; 21 W.R. 409; 1 Digest (Repl.) 39, *287.*

(2) *Appleby* v. *Franklin* (1885), 17 Q.B.D. 93; 55 L.J.Q.B. 129; 54 L.T. 135; 50 J.P. 359; 34 W.R. 231; 2 T.L.R. 170; 1 Digest (Repl.) 76, *573.*

(3) *Stone* v. *Marsh, Stracey and Graham* (1827), 6 B. & C. 551; 9 Dow. & Ry.K.B. 643; Ry. & M. 364; 5 L.J.O.S.K.B. 201; 108 E.R. 554; 1 Digest (Repl.) 454, *1053.*

(4) *White* v. *Spettigue* (1845), 1 Car. & Kir. 673; 13 M. & S. 603; 14 L.J.Ex. 99; 4 L.T.O.S. 317; 9 J.P. 761; 9 Jur. 70; 153 E.R. 252; 1 Digest (Repl.) 74, *557.*

(5) *Wells* v. *Abrahams* (1872), L.R. 7 Q.B. 554; 41 L.J.Q.B. 306; 26 L.T. 433; 36 J.P. 710, 20 W.R. 659; 36 J.P. Jo. 260; 1 Digest (Repl.) 76, *565.*

Also referred to in argument:

Re Shepherd, Ex parte Ball (1879), 10 Ch.D. 667; 48 L.J.Bcy. 57; 40 L.T. 141; 27 W.R. 563; 14 Cox, C.C. 237, C.A.; 1 Digest (Repl.) 76, *566.*

Midland Insurance Co. v. *Smith* (1881), 6 Q.B.D. 561; 50 L.J.Q.B. 329; 45 L.T. 411; 45 J.P. 699; 29 W.R. 850; 1 Digest (Repl.) 73, *547.*

Roope v. *D'Avigdor* (1883), 10 Q.B.D. 412; 48 L.T. 761; 47 J.P. 248; 1 Digest (Repl.) 76, *570.*

Appeal by the defendant from an order of LORD COLERIDGE, J., at chambers.

The plaintiffs were husband and wife. By their statement of claim they alleged as follows:

1. The plaintiff Dorothy Smith is the wife of the plaintiff William Charles Smith, and at the time of the grievances hereinafter complained of resided with him at No. 1, Dudley Road, Ilford, Essex. In and about December, 1913, the said Dorothy Smith was desirous of obtaining an engagement as a vocalist on the theatrical or music-hall stage, and in response to an advertisement in the "Stage" newspaper of Dec. 11, 1913, attended at the Hippodrome, Greenwich, and there saw the defendant. The defendant is part proprietor and the manager of the said Hippodrome. On the said Dec. 11, 1913, the said plaintiff was given a trial turn at the said Hippodrome, and was afterwards, on the said day in her professional name of "Miss Dorothy Hayes," by a contract in writing signed by the defendant, engaged by the defendant to appear at the said Hippodrome as a vocalist in her usual performance, on a date to be arranged, at a salary of £3 per week, and to give one matinée if required. The said plaintiff accepted the said engagement, and it was on the said Dec. 11, 1913, subsequently verbally agreed that her engagement should commence on Dec. 15, 1913.

2. On Dec. 12, 1913, the defendant, intending and contriving to corrupt and violently or otherwise have criminal relations with the said plaintiff, by a telephone message to the said plaintiff, induced the said plaintiff as and for a rehearsal to again attend and the said plaintiff did attend at the said Hippodrome. The defendant on the said Dec. 13, 1913, at the said Hippodrome, then intending and contriving as aforesaid in pursuance of his said designs, verbally induced the said plaintiff to accept and partake of some liquid alleged by the defendant and believed by the said plaintiff to be brandy, but which, as the defendant well knew, was not brandy but was brandy and/or a liquid mixed with or composed of some noxious poisonous narcotic or other drug (the name of which is at present unknown to the plaintiff or either of them) which, as the defendant well knew, was calculated and by him intended to have the effect of rendering the said plaintiff powerless and incapable of muscular control or resistance, and of reducing her to a state of collapse and insensibility.

3. The plaintiff being so induced by the defendant, and believing as aforesaid, drank part of the said liquid, and almost immediately thereafter in consequence thereof became injuriously affected and oppressed by a sense of suffocation and giddiness, and was rendered powerless and incapable of muscular control or resistance and was reduced to a state of collapse and insensibility, and while the said plaintiff was so affected as aforesaid and under the influence of the said drug the defendant unlawfully and indecently assaulted the said plaintiff, and violently against her will had, or alternatively attempted to have, carnal knowledge and intercourse with her.

4. In consequence of the premises the said plaintiff became and was ill and suffered much mental and physical pain, and for a long time feared pregnancy, and she was unable to discharge her household duties as theretofore, and her marital relations with her husband, the plaintiff, William Charles Smith, became strained and impaired, and she lost for a long time the consortium of her husband, and she was and still is unable to follow her occupation, and she lost the benefit of her said engagement as a vocalist at the said Hippodrome and she was injured in her character, credit, and reputation as a vocalist. And the plaintiff, William Charles Smith, lost the services of his said wife in the discharge of her said household duties, and his marital relations with her were and became strained and impaired and he lost the consortium of his said wife. The plaintiffs claimed damages.

The defendant applied at chambers for an order to stay or dismiss the action as being an abuse of the process of the court upon the ground that the statement of

claim disclosed, as the basis of the action, a felony under s. 22 of the Offences against the Person Act, 1861, for which the defendant had not been prosecuted. On Mar. 5, 1914, Master CHITTY made an order refusing the application to stay the action, and that order was affirmed by LORD COLERIDGE, J., on Mar. 13. The defendant appealed.

C. W. Lilley for the defendant.
C. E. Jones for the plaintiffs.

KENNEDY, L.J.—This case raises a somewhat difficult, but at the same time, interesting question. The appeal is brought against an order of LORD COLERIDGE, J., who affirmed an order of Master CHITTY, refusing to stay or dismiss the action. The ground of the present appeal is that the statement of claim on its face alleges material facts which, if true, are so alleged for the purpose of justifying a claim to damages for assault as to constitute a charge of felony against the defendant, and that as there has been no prosecution for the felony and no reasonable excuse shown for a prosecution not having taken place, it is not open to the plaintiffs to claim damages in a civil action for that wrong.

The question which has been raised is not an easy one to solve and some of the decisions which were cited in argument are not easy to reconcile. In the result, however, this is certain that the court has a right, if not an imperative duty, to stay proceedings in a civil action to recover damages if it is clear that the basis of the civil action is a felony committed by the defendant. I think it is quite useless to go over the ground again which has been so amply covered by counsel. I think the result of the cases is this, that it is the duty of the court in each instance, to consider whether there should be a stay or not if it is clear that the cause of action arises from a felony. I have, myself, come to the conclusion that while paras. 2 and 3 of the statement of claim might be construed as alleging facts upon which the plaintiffs will rely for their claim for damages for an assault on the female plaintiff, yet the scheme is substantially—and it is admitted that it was so intended—to allege that the defendant induced the female plaintiff to go to a particular place with the intent to have carnal knowledge of her, and when she was there with the same intent or design, as the statement of claim puts it, induced her to take some liquid with a drug in it and did it with a view so as to render her incapable of muscular control and resistance, and while she was in that condition carried out his design to assault her and against her will either had or attempted to have carnal knowledge of her.

In my opinion, apart from the allegation that the defendant had carnal knowledge of her, what is alleged here is a proceeding which, if proved, constitutes a felony within s. 22 of the Offences against the Person Act, 1861. I do not think that that section is overridden or affected by s. 3 (3) of the Criminal Law Amendment Act, 1885, whereby a similar act is made a misdemeanour. On the face of the statement of claim, there is, in my opinion, an allegation of a felony, and I think it being within the power of the court to stay the proceedings in the action, and the result of the cases which have been cited being that that is the proper course to adopt, we ought to act on that and not allow the action to go to trial. I think we ought to stay the proceedings, but not absolutely, without giving the plaintiffs an opportunity of alleging, as the basis of their claim, an assault on the female plaintiff which did not amount to a felony. In that action, I think it might be alleged that the person so assaulted was unable to resist because of her physical condition. Although it may not be easy, I conceive it to be possible to state a good cause of action without alleging felony as the basis of it. I think the plaintiffs are entitled to be allowed to allege that and have it tried, and I should be very loth to exercise our power in such a way as to deprive the plaintiffs of all remedy. I think our order should be to uphold the decision of the learned judge in so far as he refused to grant a stay, such stay, however, to be granted with liberty to the plaintiffs to apply for leave to proceed to action with such amended

statement of claim as might be approved by the court. Of course, if the plaintiffs choose to take criminal proceedings the bar to the continuance of the present action would forthwith disappear. I only wish to add here that there are two plaintiffs, husband and wife, and if any distinction is to be drawn between them it might be that the husband had a claim because the felonious act was not committed on him. I am not prepared to overrule the authorities that have been cited, namely, BRAMWELL, B., in *Osborn* v. *Gillett* (1) and HUDDLESTON, B., and WILLS, J., in *Appleby* v. *Franklin* (2). The two claims are so interlaced here that it is very difficult to separate them; the husband's claim is, of course, a mere bagatelle, the real claim being in respect of the injury to the wife. Under these circumstances I cannot separate them and I draw no distinction between them.

The order will in substance be to stay all further proceedings in the action on the present statement of claim with liberty to the plaintiffs to amend within twenty-one days; and if no amendment is made within this time, the action to be stayed until after criminal proceedings have been taken against the defendant. The appeal must, therefore, be allowed.

SWINFEN EADY, L.J.—I am of the same opinion. It is now well established that, according to the law of England, where injuries are inflicted on the civil rights of an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution. In 1827, in *Stone* v. *Marsh* (3), LORD TENTERDEN, delivering the judgment of the Court of King's Bench, stated the law thus (6 B. & C. at p. 564):

> "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action."

That is the rule, and then he proceeds to state the ground of the rule.

> "The rule is founded on a principle of public policy. . . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose."

In *White* v. *Spettigue* (4) the law was laid down in somewhat similar terms by ROLFE, B., who said (13 M. & W. at p. 608):

> "I think the true principle is, that where a criminal, and consequently an injurious, act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion."

The learned judge is there speaking of an injurious act which is also a felony. So, too, COCKBURN, C.J., in *Wells* v. *Abrahams* (5) said (L.R. 7 Q.B. at p. 557):

> "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy—that is, the right of redress by action—is suspended until the party inflicting the injury has been prosecuted."

That being the established law, the question arises as to how it is to be enforced where an action is brought upon alleged facts which, if true, disclose a felony. COCKBURN, C.J., said in the same case (ibid.):

> "But it may very well be that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be

prosecuted for felony, the summary jurisdiction of this court might be invoked to stay the proceedings which would involve an undue use, probably an abuse, of the process of this court, in which case the court is always willing to interfere to prevent such abuse."

BLACKBURN, J., said (ibid. at p. 559):

"I am not prepared to say that, if an action were brought against a defendant and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the court might not, in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried."

LUSH, J., said (ibid. at p. 563):

"It is undoubtedly laid down in the text-books that it is the duty of a person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement: but by what means that duty is to be enforced we are nowhere informed."

We have, therefore, to lay down the proper course of procedure in such a case. The proper course seems to me to be that indicated by COCKBURN, C.J., in the passage I have cited—that is to say, to stay the action on terms—and I agree with the order stated by KENNEDY, L.J.

PHILLIMORE, L.J.—I am of the same opinion. It is a well-established rule of law that a plaintiff against whom a felony has been alleged by the defendant cannot make that felony the basis of an action unless the defendant has been prosecuted or some good reason has been given why a prosecution has not taken place. I am glad that the effect of our present decision will be to establish the only proper mode of enforcing that rule. I agree with the order that has been suggested and only desire to add a few words. In my opinion two distinct felonies are alleged in the statement of claim. At the end of para. 3 there is a charge of rape, and in paras. 2 and 3, read together, there is a charge of felony. It might be uncertain whether para. 2 alleged the administration of a drug to the female plaintiff with a view of making her unable to resist so that the defendant might have carnal knowledge of her. It has been frankly admitted that is the combined meaning of paras. 2 and 3. It comes, therefore, within s. 22 of the Offences against the Person Act, 1861, which is complied with, and it may also be a misdemeanour within the meaning of s. 3 (3) of the Criminal Law Amendment Act, 1885. I think there are some distinctions to be drawn between those two sections, but I care not, because the claim here is based on a felony. In my opinion, this statement of claim charges two felonies based on the same facts. I entirely agree with KENNEDY, L.J., how the matter should be dealt with.

Appeal allowed.

Solicitors: *Surridge & Mullis*, for *Mullis & Walmisley*, Ilford; *Walter Martin & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HALL BROS. STEAMSHIP CO., LTD. *v.* R. AND W. PAUL, LTD.

[KING'S BENCH DIVISION (Sankey, J.), June 16, 1914]

[Reported 111 L.T. 811; 30 T.L.R. 598; 12 Asp.M.L.C. 543; 19 Com. Cas. 384]

Shipping—Charterparty—"Port"—"Safe port"—Port at which ship could lie laden and discharge always afloat.

Under the terms of a charterparty a steamship chartered to carry a cargo of maize called at a named port "for orders to discharge at a safe port in the United Kingdom or so near thereto as she can safely get, always afloat, and deliver such cargo in accordance with the custom of the port for steamers." The ship was directed by the defendants, receivers of the cargo, to discharge at King's Lynn to which port she proceeded, but her draught was such that it was impossible for her on any tide to enter the dock there without being lightened. Accordingly, she lightened at another port ten miles away where it was usual for such vessels to lighten, and completed her discharge at King's Lynn. In an action to recover the extra expense incurred by them in lightening the vessel the shipowners contended that King's Lynn was not a safe port within the meaning of the charterparty, and that the defendants had committed a breach of contract in ordering the vessel to proceed there and were liable in damages,

Held: (i) the term "port" in a charterparty must be read in its commercial sense and not be given the meaning placed on it by the legislature in Acts passed with respect to objects such as pilotage and revenue; (ii) a safe port meant a port to which a vessel could get laden as she was and at which she could lie and discharge always afloat; and, therefore, King's Lynn was not a safe port, and the shipowners were entitled to recover: *The Alhambra* (1) (1881), 6 P.D. 68, applied.

Notes. Referred to: *G. W. Grace & Co.* v. *General Steam Navigation*, [1950] 1 All E.R. 201; *Compania Naviera Maropan S.A.* v. *Bowaters Lloyd Pulp and Paper Mills, Ltd.*, [1955] 2 All E.R. 241; *Reardon Smith Line, Ltd.* v. *Australian Wheat Board*, [1956] 1 All E.R. 456.

As to what constitutes a port and a safe port, see 30 HALSBURY'S LAWS (2nd Edn.) 515 et seq.; and for cases see 41 DIGEST 519 et seq.

Cases referred to:

(1) *The Alhambra* (1881), 6 P.D. 68; 50 L.J.P. 36; 44 L.T. 637; 29 W.R. 655; 4 Asp.M.L.C. 410, C.A.; 41 Digest 523, *3514*.

(2) *Leonis Steamship Co., Ltd.* v. *Rank, Ltd.*, [1908] 1 K.B. 499; 77 L.J.K.B. 224; 24 T.L.R. 128; 52 Sol. Jo. 94; 13 Com. Cas. 136, C.A.; 41 Digest 569, *3937*.

(3) *Hillstrom* v. *Gibson and Clark* (1870), 8 Macph. (Ct. of Sess.) 463; 22 L.T. 28 W.R. 424; 4 Asp.M.L.C. 233, D.C.; 41 Digest 519, *3478*.

(4) *Capper & Co.* v. *Wallace* (1880), 5 Q.B.D. 163; 49 L.J.Q.B. 350; 42 L.T. 130; 248; 41 Digest 564, *3894i*.

(5) *Nielsen* v. *Wait* (1885), 16 Q.B.D. 67; 54 L.T. 344; 34 W.R. 33; 2 T.L.R. 34; 5 Asp.M.L.C. 553; sub nom. *Neilson & Co.* v. *Wait & Co.*, 55 L.J.Q.B. 87, C.A.; 41 Digest 527, *3555*.

(6) *Reynolds & Co.* v. *Tomlinson*, [1896] 1 Q.B. 586; 65 L.J.Q.B. 496; 74 L.T. 591; 40 Sol. Jo. 419; 8 Asp.M.L.C. 150, D.C.; 41 Digest 522, *3510*.

(7) *Treglia* v. *Smith's Timber Co., Ltd.* (1896), 12 T.L.R. 363; 1 Com. Cas. 360; 41 Digest 518, *3475*.

Action tried by SANKEY, J., in the Commercial Court.

Mackinnon for the plaintiffs.
Inskip for the defendants.

A **SANKEY, J.**—The plaintiffs, as owners of the steamship *Peerless*, claim the sum of £48 12s. 9d. against the defendants as receivers of a cargo of maize shipped at Rosario-San Nicolas, on the said vessel, under a bill of lading dated Dec. 16, 1913, and incorporating the terms and conditions of a charterparty of Nov. 11, 1913. By the said charterparty the vessel was

B "to call at Tenerife for orders to discharge at a safe port in the United Kingdom, or so near thereto as she can safely get, always afloat, and deliver such cargo in accordance with the custom of the port for steamers."

The *Peerless* duly called at Tenerife and received orders to discharge at King's Lynn. She proceeded on her voyage, but her draught was such that it was impossible for her at any time, on any tide, to enter the dock at King's Lynn, and she C accordingly lightened at a spot known as the Bar Flat Light Buoy, which is about eleven miles off down the Wash. She then went on and discharged the remainder of the cargo in the dock. The extra expense incurred by the owners in lightening the vessel amounted to £48 12s. 9d., and, the items not being challenged, the question which falls for decision is whether the plaintiffs are entitled to recover the sum claimed.

D For them it was contended that King's Lynn was not a safe port within the meaning of the charterparty, that the defendants had committed a breach of their contract in ordering the vessel to proceed there, and were, therefore, liable in damages. The defendants, in reply, took three points: (1) That the plaintiffs were estopped from alleging that King's Lynn was not a safe port, because their master had accepted the order to proceed there; (ii) that King's Lynn was in fact E a safe port within the meaning of the charterparty; (iii) that King's Lynn included (a) the dock; (b) the place where the vessel was lightened, and, therefore, that the vessel was obliged to discharge at each of such places. As to the first of these points—namely, that the plaintiffs were estopped by the action of their master from asserting that King's Lynn was not a safe port, I am unable to accept the defendant's contention. It will be observed that King's Lynn was not inserted F either in the charterparty or the bill of lading as the port of discharge. It was the duty of the defendants on arrival of the vessel at Tenerife to order her to proceed for discharge to a safe port, or so near thereto as she could safely get, always afloat. The fact that the master went to King's Lynn caused no prejudice to the defendants, but rather the reverse. It was the place to which they directed him to go, and there was no evidence that his acceptance of their order had in any way G induced them to alter their position so as to preclude the plaintiffs from averring that King's Lynn was not a safe port. Even assuming the master to have known at Tenerife the true facts about King's Lynn, I cannot think his proceeding as he did would have estopped his owners from contending it was not a safe port. In such circumstances he would have had the right to get as near thereto as he safely could and there discharge afloat: (see *The Alhambra* (1)). And his conduct H at Tenerife and after not only was reasonable and in the interests of the defendants, but minimised the loss or damage they would have sustained or incurred by the captain proceeding elsewhere. Further, there was no evidence that the master had any authority to take his vessel to a port which was not safe.

Before discussing the other two points, which may be dealt with together, it is necessary to ascertain the facts. I am satisfied that at no time, on any tide, could I the *Peerless* have got into King's Lynn dock without being lightened. All vessels situated as she was lighten at Bar Flat Light Buoy. By the King's Lynn Conservancy Act, 1897, the limits of the port of King's Lynn are defined, and it was proved that the Bar Flat Light Buoy was not only within such limits, but ten miles within them from a seaward direction. It was, therefore, contended that the port of King's Lynn within the meaning of the charterparty included (a) the dock, (b) the place where the vessel lightened, and that the vessel was obliged to go to each of such places. In so far as it is a question of fact I find that the port of King's Lynn is the dock at King's Lynn itself, and not the Bar Flat Light Buoy

eleven miles down the Wash, or, indeed, if the defendants' contention is correct, any place even ten miles further out at sea.

In my opinion the term "port" in a charterparty is to be taken in its commercial sense, and is not to be defined by the meaning given to it by the legislature in Acts passed for such entirely different objects as pilotage or revenue. Any doubt or controversy on the point must now be taken as settled in *Leonis Steamship Co., Ltd.* v. *Rank, Ltd.* (2), where BUCKLEY and KENNEDY, L.JJ., discuss all the cases. Founding myself on their judgments, I come to the conclusion that the port of King's Lynn in a commercial sense is the dock at that place.

This brings me to the final point, Was King's Lynn a safe port within the meaning of the charterparty? In my view it was not. A safe port means a port to which a vessel can get laden as she is and at which she can lay and discharge, always afloat. I am aware that there are decisions on the point which appear to conflict, but I think *The Alhambra* (1) is correct, and that it governs this case. There are three decisions which appear to conflict: (i) *Hillstrom* v. *Gibson and Clark* (3) was a decision of the majority of the Scottish Court of Appeal, and is entitled to the greatest respect, but I am unable to distinguish its facts from those in *The Alhambra* (1), which I am bound to follow, and it appears to me from the observations on p. 73 of the report that BRETT, L.J., did not agree with the Scottish judges; (ii) the decision by a Divisional Court in *Capper & Co.* v. *Wallace* (4) really supports the contention of the present plaintiffs, and such dicta as are founded on *Hillstrom* v. *Gibson and Clark* (3) must be now taken subject to the remarks in *The Alhambra* (1) where it was cited; (iii) in *Nielsen* v. *Wait* (5) there was a finding that Sharpness was in the port of Gloucester, and that there was a custom to lighten at Sharpness. The present point was not discussed nor was *The Alhambra* (1) cited. See further the remarks of DAY, J., in *Reynolds & Co.* v. *Tomlinson* (6) ((1896) 1 Q.B. 586). Further, MATHEW, J., in *Treglia* v. *Smith's Timber Co., Ltd.* (7) approved *The Alhambra* (1).

To sum up, we have on the one hand in 1881 the decision of JAMES, BRETT, and COTTON, L.JJ., in *The Alhambra* (1), which is directly in point, followed in 1896 by DAY and LAWRANCE, JJ., in *Reynolds & Co.* v. *Tomlinson* (6), and also in 1896 by MATHEW, J., in *Treglia* v. *Smith's Timber Co., Ltd.* (7). On the other hand, we only have the decision in *Nielsen* v. *Wait* (5) where different considerations arose, and *The Alhambra* (1) was not cited. Under these circumstances I prefer to follow *The Alhambra* (1), and I give judgment for the plaintiffs for the amount claimed.

Solicitors: *Williamson, Hill & Co.*, for *Ingledew & Fenwick*, Newcastle-upon-Tyne; *Lowless & Co.*

[*Reported by* LEONARD C. THOMAS, ESQ., *Barrister-at-Law.*]

MAIDLOW *v.* MAIDLOW

[Court of Appeal (Swinfen Eady and Pickford, L.JJ.), July 23, 1914]

[Reported [1914] P. 245; 84 L.J.P. 20; 112 L.T. 804]

Divorce—Maintenance of wife—Variation of order—Order by consent for yearly payments to wife "for her life"—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1 (2) (*a*).

A wife, having obtained a divorce from her husband, petitioned for an order for permanent maintenance. The registrar reported that the parties had agreed on the amount to be paid and submitted that the husband should pay that sum to the wife "for her life," and an order was made on the application of the wife in that form. Subsequently the wife petitioned for an increase of the maintenance and the husband cross-petitioned for a reduction. At the hearing before the registrar the wife withdrew her petition, contending that as the order was a consent order the court had no jurisdiction to vary it.

Held: if the consent order had been for the payment of permanent maintenance to the wife during the joint lives of husband and wife, the mere fact that the parties had agreed the amount to be paid would not have prevented an application being made under the provisions of s. 1 (1) (a) of the Matrimonial Causes Act, 1907 [now s. 28 of the Matrimonial Causes Act, 1950], for an increase or decrease of the amount if the circumstances of the parties had subsequently changed, but as the consent order was made for payment to the wife "for her life" the court had no jurisdiction to vary it, and the presentation of the wife's petition for an increase of maintenance did not estop her from relying on the order.

Notes. The Matrimonial Causes Act, 1907, was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. For s. 1 of the Act of 1907, see now ss. 19 and 28 of the Matrimonial Causes Act, 1950 [29 Halsbury's Statutes (2nd Edn.), pp. 407 and 414].

Considered: *Abbott* v. *Abbott* (1930), 160 L.J.P. 36; *Hinde* v. *Hinde*, [1953] 1 All E.R. 171. Referred to: *Re Landau, Ex parte Trustee* v. *Bankrupt*, [1934] All E.R.Rep. 130; *Mann* v. *Mann*, [1936] 1 All E.R. 952.

As to variation of an order for maintenance, see 12 Halsbury's Laws (3rd Edn.) 444 et seq.; and for cases see 27 Digest (Repl.) 621 et seq.

Appeal by the husband from an order of Sir Samuel Evans, P., dismissing the husband's appeal from an order of the registrar whereby he dismissed a petition by the husband for the reduction of permanent maintenance to be paid by the husband to the wife.

On June 7, 1894, a marriage took place between Mr. and Mrs. Maidlow, and there was one daughter, the only issue of the marriage, who was born in 1895. On July 23, 1907, the wife obtained a decree nisi for dissolution of the marriage on the ground of the adultery and cruelty of her husband, and that decree was made absolute on Feb. 3, 1908. On Feb. 13, 1908, the wife presented a petition for permanent maintenance, and the averments therein contained were referred to the registrar for investigation and to make a report. On May 19, 1908, the registrar made his report. He therein stated the marriage between the husband and the wife, the issue of the marriage, and that the wife had obtained a decree nisi for dissolution of the marriage, and that the decree was made absolute on Feb. 3, 1908. He then stated the pecuniary position of the husband and of the wife, who were both people of small means; and that the husband's income was variously stated by the parties: the wife putting it at £600 and commissions, and certain other sources of income unknown to the wife. The husband put his salary at £400 a year without commissions, and stated his only other receipts to be £33

a year. It was admitted that the wife had £120 a year under her father's will. The registrar then went on to report as follows:

> A suggestion was made by me on the first hearing, which, with a trifling variation, was assented to by both the parties, when they came before me again. The amount to be paid is therefore agreed. It is £90 a year for the petitioner and £30 a year for the daughter till twenty-one. The usual course would be that such an order should be made on summons by a registrar. The [wife] has, however, been advised by her counsel that, for her greater security against the [husband's] creditors, actual or possible, she should ask for an order, to be confirmed in open court. It is therefore submitted that the [husband] should be ordered to pay the agreed amount of £90 a year to the [wife] for her life and £30 a year to the daughter till she is twenty-one, such payments to begin from Feb. 3, 1908, the date of the decree absolute.

On June 1, 1908, an order was made on the application of the wife by BARGRAVE DEANE, J., that the report of the registrar should be confirmed; and that the husband should pay the agreed amount of £90 a year to the wife "for her life" and £30 a year to the daughter till she was twenty-one, such payments to commence from the date of the decree absolute. On Oct. 13, 1913, the wife presented a petition for an increase of the permanent maintenance on the ground that since the date of the order of BARGRAVE DEANE, J., the property and income of the husband had increased. On Dec. 13, 1913, the husband presented a cross-petition for a reduction of the permanent maintenance.

On the matter coming on for hearing before the registrar it was contended, on behalf of the wife, that as the order made by BARGRAVE DEANE, J., was a consent order the court had no jurisdiction to vary it. The wife's petition was accordingly withdrawn. On June 23, 1914, the registrar dismissed the husband's cross-petition. The husband appealed to SIR SAMUEL EVANS, P., from so much of the registrar's order as dismissed the petition, and the President dismissed his appeal. The husband now appealed to the Court of Appeal.

Bayford for the husband.
Le Bas for the wife.

SWINFEN EADY, L.J.—In this case the husband appeals against so much of the order of the learned President as dismissed a petition by the husband for the reduction of the amount of the permanent maintenance that was ordered to be paid by him to the wife. [HIS LORDSHIP stated the facts as above set forth and read the report of the registrar, and continued:]

If the report had not contained the clause in the submission, and there had been an order by consent in the language of the Matrimonial Causes Act, 1907, for the payment of maintenance to the wife during the joint lives of the husband and the wife, then, in my opinion, the mere fact that the parties had agreed the sum to be paid would not have prevented an application from being made under the provisions of s. 1 (2), of that Act if the circumstances of the parties afterwards changed. It may well be that the parties consented to what would be a proper allowance, having regard to the means of the husband and wife, and that they determined on a proper amount rebus sic stantibus. If, however, there should be a material change of circumstances after the order has been made, even though by consent, for the payment of the sum agreed upon for their joint lives, that fact would not prevent an application being subsequently made, if circumstances altered, for the sum to be increased or decreased.

Unless the parties consent to an order in the form suggested by the registrar, it was objected that there was no jurisdiction in the judge to make such an order. He could, it was said, order payment of maintenance during the joint lives under the statute, but there is no power under s. 1 (2) to order payment to the wife "for her life." Under s. 1 (1) the court is empowered, if it thinks fit, on any decree for dissolution or nullity of marriage, to order that the husband shall, to the

satisfaction of the court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her life, as having regard to the various circumstances there specified, may be deemed reasonable. Under sub-s. (2) of the same section the court is empowered, if it thinks fit, to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sum for her maintenance and support as the court may think reasonable. It was argued that there was a bargain in the present case between the husband and the wife which the court was not at liberty to vary; and that the wife accepted a less sum than she might otherwise have claimed, so that she might have the advantage of receiving it "for her life." In my opinion that is the right view, and an order so made cannot be subsequently varied.

Then it is said that by her petition the wife herself has sought to vary the order. But the argument based upon that cannot, in my opinion, be maintained. There has been no fresh bargain. As soon as the matter passed into counsel's hands and the form of the order was observed, the petition was withdrawn. The registrar also noted the same objection, and the petition was dismissed.

This conclusion to which I have come is founded upon the words appearing in the order "for her life." Counsel for the husband has said that he has evidence as to the circumstances in which the words came to appear in the report and in the order. This judgment proceeds upon the footing that those words are there. Any application to correct the order must be made to the court below. If, as is said, the words are only there per incuriam, the order ought to be corrected, and the position will be different. But the words are there now, and it is not open to us to consider an application to strike them out. This appeal fails, with the usual consequences.

PICKFORD, L.J.—I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *J. D. Arthur*; *Willis & Willis*, for *E. J. Howard*, Bournemouth.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

THAMES AND MERSEY MARINE INSURANCE CO. *v.* BRITISH AND CHILIAN STEAMSHIP CO.

[COURT OF APPEAL (Swinfen Eady, Phillimore and Pickford, L.JJ.), November 4, 5, 1915]

[Reported [1916] 1 K.B. 30; 85 L.J.K.B. 384; 114 L.T. 34; 32 T.L.R. 89; 13 Asp.M.L.C. 221; 21 Com. Cas. 150]

Insurance—Marine insurance—Subrogation—Loss of ship and cargo—Shipowners held partially responsible—Right of insurers to be subrogated up to insured sum.

The plaintiff insurance company insured the defendants' ship for £45,000 and paid this sum to the defendants when the ship sank after a collision. In a collision action the defendants were held to be seven-twelfths responsible for the loss. In further proceedings, on appeal from a registrar, the learned President laid down the principles upon which the compensation figure was to be based, and this was eventually agreed at £67,000 of which the defendants, being entitled to five-twelfths, received £26,000. This figure included compensation for both charter and ship and was not apportioned. The insurers

claimed to be subrogated and to be entitled to be paid by the defendants the whole of the amount recovered by them in the collision action up to £45,000.

Held: (i) the insurers were entitled to recover from the defendants all sums which the defendants received in respect of the ship up to £45,000, the amount of the insurance; (ii) the matter of apportionment should be referred back to the registrar.

Notes. Considered: *Boag* v. *Standard Marine Insurance Co., Ltd.*, [1937] 1 All E.R. 714. Referred: *Goole and Hull Steam Towing Co., Ltd.* v. *Ocean Marine Insurance Co., Ltd.*, [1927] All E.R.Rep. 621.

As to subrogation, see 22 HALSBURY'S LAWS (3rd Edn.) 160 et seq.; and for cases see 29 DIGEST 290 et seq. For the Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14.

Cases referred to:

(1) *The Racine*, [1906] P. 273; 75 L.J.P. 83; 95 L.T. 597; 22 T.L.R. 575; 10 Asp.M.L.C. 301, C.A.; 41 Digest 809, *6707*.

(2) *North of England Iron Steamship Insurance Association* v. *Armstrong* (1870), L.R. 5 Q.B. 244; 39 L.J.Q.B. 81; 21 L.T. 822; 18 W.R. 520; 3 Mar. L.C. 330; 29 Digest 122, *748*.

Appeal by the defendants from a decision of SCRUTTON, J., in an action tried by him without a jury, reported, [1915] 2 K.B. 214.

SCRUTTON, J., held (i) that the underwriters were entitled to recover to the extent to which they had paid in respect of the subject-matter insured any sums which the defendants had received in respect of the loss of the same subject-matter, although that sum was based on a larger value than the insured value; and (ii) that, as the underwriters only insured the ship for one year, they were not concerned with the value of the ship in 1917, and that, as on the evidence the value of the ship at the time of the loss must be taken to be £65,000, in respect of which the defendants had received from the owners of the *E.* £26,900, the underwriters were entitled to be subrogated to the defendants to the full amount of £26,900, and to recover from the defendants the difference between that sum and the amount payable under the running-down clause, and judgment was accordingly given for the plaintiffs.

The facts are set out in the judgment of SWINFEN EADY, L.J.

Leslie Scott, K.C., and *Raeburn* for the defendants.
Maurice Hill, K.C., and *D. Stephens* for the plaintiffs.

SWINFEN EADY, L.J.—This is an appeal by the defendants from the judgment of SCRUTTON, J., at the trial of an action in which the Thames and Mersey Marine Insurance Co. were plaintiffs and the British and Chilian Steamship Co. were the defendants.

The plaintiffs under a valued policy insured the ship for the sum of £45,000. The ship was under charter to the Dominion Coal Co. for a period of seven St. Lawrence seasons, commencing with the spring of 1911 and expiring, therefore, in 1917. There was a collision between the steamship *Helvetia*, the subject of the insurance, and the *Empress of Britain*, with the result that the *Helvetia* was sunk, and the plaintiffs have paid as for a total loss £45,000. Proceedings were taken in the Admiralty Court to determine the responsibility for the collision, and the result of the proceedings was that both vessels were pronounced to blame, and the share of the loss to be paid by the *Empress of Britain* was fixed at five-twelfths. Under the collision clause the plaintiffs are liable in respect of the loss and damage arising from the collision to pay a sum of £19,660. In the proceedings taken to ascertain the amount payable by the *Empress of Britain* an inquiry was directed, and in the first instance the registrar reported purporting to follow the case of *The Racine* (1), and he took the value of the ship as at Nov. 15, 1912, which was not the date of the collision, but the end of the current season, and he fixed it at

£65,000, and he took the loss of hire up to the same date and assessed that at £2,000. There was an appeal from that. The shipowners appealed, and the matter came before the President, and he held that on the true effect of *The Racine* (1) the value of the ship should be taken as at November, when the charter would expire, and that the hire should be assessed to that date, and accordingly he remitted the report to the registrar to reconsider the matter upon that basis. The parties then went again before the registrar, and the result was that the parties, then being the *Helvetia* on the one side and the *Empress of Britain* on the other, agreed upon a lump sum of £67,000, without dividing the amount as between ship and charter. For five-twelfths of that sum the *Empress of Britain* was held to be liable, and she has paid a sum of, roughly, £26,900. The present action is brought by the underwriters claiming to be subrogated to the position of the shipowners in regard to the sum recovered in respect of the ship and to obtain payment of the amount.

The first question which was raised in the action and which has been raised before us on this appeal is, what is the right of the underwriters, the plaintiffs, to recover in respect of that amount? The whole of the insured value being covered by insurance, the claim of the plaintiffs is to recover from the defendants the whole of the amount recovered by them in the collision action up to £45,000, the amount of the policy; on the other hand, the defendants have contended that by the decree of the Admiralty Division they were held entitled to recover in the collision action five-twelfths of their loss, and they say that as between the plaintiffs and the defendants that loss must be treated as £45,000, and that it is to their rights in that respect that the plaintiffs are subrogated, and that they are consequently entitled only to recover five-twelfths of £45,000. SCRUTTON, J., decided in favour of the plaintiffs on that point. He held that the insurers were entitled to recover to the extent to which they paid in respect of the subject-matter insured any sum which the shipowners had received in respect of the loss, although that sum was based on a larger value than the insured value. By s. 27 of the Marine Insurance Act, 1906, it is provided that:

> "(i) A policy may be either valued or unvalued. (ii) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (iii) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial."

By s. 79 it is provided:

> "(i) Where the insurer pays for a total loss, either of the whole, or, in the case of goods, of any apportionable part, of the subject-matter insured [here the insurer has paid for a total loss of the ship] he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss."

What the insurers here are really saying is that, according to the true construction of the statute, they are entitled to be subrogated to all the rights and remedies of the assured in and in respect of the subject-matter of the ship, and not to part of it only. In my opinion, the Act embodies the law as laid down in *North of England Iron Steamship Insurance Association* v. *Armstrong* (2) and the judgment below was right on this point, and the plaintiffs are entitled to recover from the shipowners all the sums which the shipowners received in respect of the ship up to the £45,000, the amount of the insurance.

The second point is a different one. The defendants contend that in apportioning the sum recovered in the collision action the learned judge was wrong in fixing £65,000 as the value of the subject-matter insured at the time of the loss—

that is to say, as the value of the ship. The sum recovered was recovered as a lump sum and there was no apportionment, and there has as yet been, apart from the learned judge's judgment, no apportionment of this sum as between ship and charter. It was a compromise, and the parties agreed to a lump sum. The President laid down in his judgment on appeal from the registrar the basis upon which the figures were to be arrived at. [His Lordship then dealt with this point and concluded:] In my opinion, the proper way to deal with the matter is to refer it back, having decided that the underwriters are entitled to recover the whole amount recovered by the shipowners in respect of the ship, and to direct an inquiry how the sum of about £26,000, the larger sum, ought to be apportioned as between the ship and the charter upon the basis of the President's judgment.

PHILLIMORE, L.J.—I agree.

PICKFORD, L.J.—I agree.

Appeal dismissed. Reference to referee.

Solicitors: *Rawle, Johnstone & Co.*, for *Hill, Dickinson & Co.*, Liverpool; *Alfred Bright & Sons*, for *Batesons, Warr & Wimshurst*, Liverpool.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

HUTH *v.* HUTH

[Court of Appeal (Lord Reading, C.J., Swinfen Eady, L.J., and Bray, J.), March 25, 26, 1915]

[Reported [1915] 3 K.B. 32; 84 L.J.K.B. 1307; 113 L.T. 145; 31 T.L.R. 350]

Libel—Publication—Unsealed addressed envelope—Envelope opened and alleged libel read by servant in breach of duty—Liability of contents of envelope to be read by postal officials.

The defendant sent an alleged libel through the post in an unsealed envelope addressed to the plaintiff. The plaintiff's butler, in breach of his duty, read the contents of the letter.

Held: (i) there was no evidence that to the defendant's knowledge a letter addressed to the plaintiff would be likely to be unjustifiably opened by the butler; (ii) there was no presumption that as an unsealed envelope went through the post it would be opened and the contents read by postal officials; and, therefore, there was no publication of the matter complained of.

Notes. Considered: *Roff* v. *British and French Chemical Manufacturing Co. and Gibson*, [1918] 2 K.B. 677.

As to publication of a libel, see 24 Halsbury's Laws (3rd Edn.) 33–43; and for cases see 32 Digest 76.

Cases referred to:

(1) *Thorley* v. *Earl of Kerry* (1812), 4 Taunt. 355; 3 Camp. 214, n.; 128 E.R. 367; 32 Digest 29, *202*.
(2) *Delacroix* v. *Thevenot* (1817), 2 Stark. 63, N.P.; 32 Digest 77, *1078*.
(3) *Robinson* v. *Jones* (1879), 4 L.R.Ir. 391; 32 Digest 77, *1073ii*.
(4) *Gomersall* v. *Davies* (1898), 14 T.L.R. 430, C.A.; 32 Digest 77, *1079*.
(5) *Sadgrove* v. *Hole*, [1901] 2 K.B. 1; 70 L.J.K.B. 455; 84 L.T. 647; 49 W.R. 473; 17 T.L.R. 332; 45 Sol. Jo. 342, C.A.; 32 Digest 116, *1485*.

Also referred to in argument:

Williamson v. *Freer* (1874), L.R. 9 C.P. 393; 43 L.J.C.P. 161; 30 L.T. 332; 22 W.R. 878; 32 Digest 116, *1482*.

Clutterbuck v. *Chaffers* (1816), 1 Stark. 471, N.P.; 32 Digest 77, *1077*.

Appeal from a decision of DARLING, J., in an action for libel.

H. A. McCardie (*Marshall Hall*, *K.C.*, and *Barrington Ward* with him) for the plaintiffs.

Hohler, *K.C.* (*C. Doughty* with him), for the defendant.

LORD READING, C.J.—The four plaintiffs, who are infants, bring an action for libel against the defendant, who is their father. As they are infants, the action is brought in the name of their next friend, and the object of the action is, it is said, to obtain an injunction to prevent the repetition of the matter which, according to the plaintiffs' case, is defamatory. For some reason, which we do not know, the wife of the defendant left him, and went to live at Torquay with her four children in the house, apparently, of a Miss Stark, the next friend. It is neither material nor necessary to probe into the delicate question of the relations existing between the husband and the wife; it is sufficient to say that the defendant was evidently extremely annoyed, or wished in some way to annoy his wife, and he sent a letter addressed to her which has given rise to this action for libel.

The letter was addressed to Mrs. Huth, by her maiden name, care of Miss Stark, at the address at Torquay. Inside the letter was an account, an ordinary tradesman's bill, which had been sent by a saddler named Boyes to Captain Huth, the defendant, in respect of some bill for £2 or £3 which had been incurred upon orders given by Mrs. Huth. Captain Huth sent the bill in an envelope addressed as I have just described, and across the bill, or on it, wrote the words complained of in this case. "Mrs. Huth" was struck out, and in the defendant's handwriting appear the words "not known, try Miss Edith Greaves"—that is, the maiden name of Mrs. Huth. Later there appear on the same document addressed to the saddler the words: "The woman known as 'Mrs. Huth' "—that is in inverted commas—"will henceforth take her maiden name of Miss Edith Greaves.—Yours truly, P. S. HUTH." Again, on the same document is this: "The woman in question has forfeited all claims to the title of 'Mrs. Huth' "—and "Mrs. Huth" again is in inverted commas—"and I hereby and herewith disown her.—P. S. HUTH." That account, with this writing of the defendant upon it, was inclosed in the envelope addressed, as I have said, to the lady in her maiden name, and stamped with a halfpenny stamp, the envelope being consequently neither sealed nor gummed.

When the action came before DARLING, J., and a jury, he withdrew the case from the jury on the grounds, first, that there was no evidence of publication; secondly, that the words complained of were not capable of a meaning defamatory of the persons who were suing; because in this case it was not the wife who was suing, on account of the difficulties arising by reason of the law relating to husband and wife, but the four infant children, the allegation being that as the libel was that Mrs. Huth had not really gone through a marriage ceremony, or a valid marriage ceremony with Captain Huth, therefore the four children were illegitimate. That was the innuendo. The learned judge came to the conclusion that the words complained of were not capable of bearing a defamatory meaning of the four children. The plaintiffs appealed to this court, and we have had an able and interesting argument upon both questions.

It is said with regard to the first point—namely, publication, that there was evidence to go to the jury that this document had been published to some third person because, first, the butler had in fact read it. It is said that his attention was attracted by the peculiar form of address to Mrs. Huth, as he had lived for some thirteen or fourteen years with Captain and Mrs. Huth and knew the lady's maiden name, and that he then took out the account and read the defamatory

matter. The butler was called at the trial, and said that he opened the letter in the sense of removing the document from inside the envelope, and read it. He said that he did that because he was curious. It cannot be contended, and is not contended, as I understand, that if a person, in breach of his duty, opens an envelope and reads a letter, and there is no reason to expect that he would be likely to commit this breach of duty, the fact that he opens the envelope and reads the letter amounts to publication by the person who sends it; but it is argued in this case that, as the document was enclosed in an unsealed and ungummed envelope, it must be assumed that the defendant knew, or ought to have known, or might have expected that a servant in the house would open a letter in such an envelope so addressed. It is further said that an envelope unsealed, with a half-penny stamp on it, is liable always to be opened by the postal authorities and the document is liable to be examined and read, and consequently that it must be taken that there was some evidence of publication to the Post Office.

With regard to the first point, that is the publication to the butler, I am clearly of opinion that there is no evidence of any such publication to the butler upon the point merely whether the fact that the butler opened the letter and read it because he was curious, would make it publication by the defendant. Fortunately, it is no part of a butler's duty to open the letters that come to the house of his master or mistress addressed to the master or mistress; and in this case there is nothing exceptional in it except that his curiosity was excited by reason of the lady being addressed by her maiden name. No one can help a man's curiosity being excited, but it does not justify him in opening a letter, and it could not make the defendant liable for the publication to the butler of the contents of the envelope, because it must of course be borne in mind that, however insulting and offensive the matters may have been which the husband wrote to his wife, they were addressed to the wife and only intended for the wife, and she alone saw them, no action for libel could be brought by her. An action for libel can only be brought if there is publication to some third person. The publication to the butler in this case is not sufficient.

Counsel for the plaintiffs has argued strenuously, and very ingeniously, a further point with regard to the Post Office, and I think that that broad general proposition requires somewhat careful examination. Certainly I should be very sorry to lay down any proposition of law which would enable libels to be published with greater safety than has hitherto been the case; but the ground put forward here is that there is a presumption of fact that when a postcard is forwarded through the Post Office the contents of the postcard have been published to some third person, and consequently the mere fact of proving that the postcard was written by the defendant and posted by him is in itself held to be some evidence that the defendant published the writing on the postcard. That is a presumption of fact founded on clear grounds rather than of law. It has been laid down, and I think rightly, that the court will take judicial notice of the nature of the document, which is the postcard, and will presume, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have read what is written thereon. In this way the presumption of law based on the authorities arises. If, of course, even in such a case as that, the defendant could establish that the postcard never was read by a single person—if it were possible to establish such a state of things, although it is very difficult to conceive—he would, notwithstanding the presumption, succeed in the action, because he would have proved that there was no publication. But of course he cannot, and does not. The fact that it is practically impossible to prove that anyone did read the postcard is the very reason why the law takes judicial notice of the nature of the document, and says the mere fact that it is written on a postcard which is posted must be taken as some evidence that a third person will read it, or has read it. Now, that is clear law, and is quite beyond dispute.

Then counsel for the plaintiffs says: "Yes, if that is so with regard to a postcard, you must make the same presumption with regard to a letter which is un-

sealed and ungummed; in other words, you must never treat a document which is circulated with a cover just as you would treat a document circulated without a cover." The question really in this case is whether that is right. Counsel for the plaintiffs has referred us to several authorities which require very short examination. With regard to the case in 1812, *Thorley* v. *Earl of Kerry* (1), before Mansfield, C.J., in which really the point was not taken at all, the matter came before the court on a writ of error. It appears that in 1812 Lord Kerry had written a letter which he had delivered unsealed to his servant to carry. One does not wonder that the point of law was not taken that that was no evidence of publication to the servant. That was long before the days of postcards, or of the halfpenny post in unsealed or ungummed envelopes. It is said that in *Delacroix* v. *Thevenot* (2), in the year 1817, there was a similar statement of law, although under different circumstances. Lord Ellenborough there held that, notwithstanding that the letter was not private and sent to the address of the plaintiff, if the clerk there was in the habit of opening letters directed to the plaintiff which were not marked private, and this was one of such letters and he did open it, that was evidence of publication to the clerk. There it is to be observed that the clerk said he did open it, and therefore it was proved that there was publication to him. Another case to which our attention was directed was *Robinson* v. *Jones* (3), where there is a judgment of Palles, C.B. That does not take the case any further; it deals with postcards, and really only states the law. Although it was dealing with a matter of privilege it only states the law as to postcards, which I have already stated. A further case was mentioned of *Gomersall* v. *Davies* (4), which came before the Court of Appeal. That was a case of a letter sent to the plaintiff by the defendant, opened by the clerk of the addressee, the plaintiff, in the ordinary course of business; and it was held there that there was evidence to go to the jury when the clerk came forward and said: "I opened this letter in the ordinary course of my duty. I came here and found the letters addressed to my principal, and I read this letter." There it was left by the judge to the jury, who answered the question in favour of the plaintiff, and the Court of Appeal were of opinion that it was rightly left to them, because they said on the facts that there was evidence that, to the defendant's knowledge, letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment. It is to be observed that the distinction between the case of the clerk in that case and that of the butler in the case at present under discussion is that the clerk opened it in the ordinary course of his business, while the butler opened it in breach of his duty, outside the ordinary course of his business.

That really deals with all the cases to which our attention is directed, and it appears to me that there is no such presumption as was contended for by counsel for the plaintiffs with regard to letters which are unsealed. It is not right, in my opinion, to treat a letter sent in an envelope with a halfpenny stamp, and which is ungummed, as though it were an open letter. Before the document can be abstracted from the envelope and read there must be some act in the nature of the opening of the letter which is ungummed by the person who has it in his hand, and I do not think that the court could presume that letters would be opened in the ordinary course of business, or that they might be opened if sent in this fashion. I do not think that that is a presumption to be drawn. It is quite true to say, and here I think counsel for the plaintiffs pressed the point very closely and very nearly home when he said that the Post Office have the right to examine the document which is in the letter stamped with a halfpenny stamp. It is part of their duty to see that that which is sent under cover of a halfpenny stamp is matter which should properly be sent for a halfpenny stamp and does not require a penny stamp. But that is not sufficient to carry the plaintiffs in this case. If they could have called a postman who said, "Yes, I did do this," or a postmaster or some official who said, "Yes, I examined this document and read it in order to see whether it was a thing which could properly go under a halfpenny stamp," then

would arise a state of things which I think counsel for the plaintiffs would be justified in saying amounted to evidence of publication by the defendant. But that is where he fails in this case. No such person can be called. I cannot think that the court is entitled to presume, merely because the envelope went through the post, that it would be opened. I suppose what is said with regard to these letters is true of every package which is sent through the Post Office. It is true of every parcel which is sent through the Post Office, and in certain circumstances it may be true also of other documents, even though they may be sealed; but that does not justify the presumption to which counsel for the plaintiffs is driven in this case—that is, that such a letter in an envelope which is ungummed is to be treated just as a postcard. I think that that point fails, and that there is therefore no evidence of publication in this case. Upon the second point—that is, whether the words are capable of a defamatory meaning, I do not propose to express my opinion. It is sufficient to dispose of this case by holding that there was no evidence of publication. Of that I am satisfied, and therefore the appeal must be dismissed.

SWINFEN EADY, L.J.—This action is one of an unusual character, being by infant children against their father for libel. It claims damages and an injunction, and the real object of the action is not to obtain pecuniary damages, but to stop the defendant's wife being persecuted and distressed by documents, alleged to contain defamatory statements of the plaintiffs, being sent to her through the post. In form, it is an action by the children, and that form was necessary by reason of the wife being unable to bring any action for libel of this kind against her husband. The substance of it is to protect the wife against a further incursion of these documents. I regard it from that point of view, and deal with the action upon that footing.

The learned judge at the trial, the plaintiffs having to prove the publication of the libel, held that there was no evidence of publication, and it is that point which is first raised on this appeal. The document in question was inclosed in an envelope, but the envelope was not sealed or fastened with any adhesive matter, or otherwise, and it was sent through the post with a halfpenny stamp. The only alleged publication was that the butler, on receipt of this letter through the post, opened it, perused it, replaced the inclosure in the envelope, and, without comment, placed it on the dining room table for his mistress on the occasion in question. The mistress was in the house; she was living there at the time. It is not suggested that the butler had any duty in connection with the letter. It could not even be alleged that the mistress was away, and that there was a question whether it was worth while to forward it, not that that would have been, unless he had authority to do so, a sufficient excuse for his conduct; but there was no excuse of that sort, and the butler was called and said, on being pressed, that he opened it really from curiosity to see what the inclosure was. So it was opened and perused by the butler in breach of his duty.

In my opinion, the question of publication can shortly be disposed of in this way. There was no publication, because there was no evidence that, to the defendant's knowledge, a letter addressed to his wife and enclosed in this envelope, but unsealed and not fastened down, would in the ordinary course be likely to be opened by the butler, or by any other person in the employ of the mistress, or at the mistress's house, before it was delivered to her.

When the cases which were referred to are looked at it will be seen that in each case the defendant, who must be taken to have intended the natural consequences of his own act in the circumstances of the case, must on that footing have intended the publication which in fact took place. In *Delacroix* v. *Thevenot* (2), where the libel was contained in a letter and the letter opened by a clerk, the evidence was not only that the clerk was in the habit of opening letters directed to his master which were not marked private, but it was further stated that the defendant, who was acquainted with the plaintiff, was aware of the nature of the clerk's employ-

ment. There LORD ELLENBOROUGH said that there was sufficient evidence for the jury to consider whether the defendant did not intend the letter to go to the hands of a third person, which would be a publication. It must be borne in mind, in connection with a publication of this sort, that it is immaterial whether the letter is sealed or unsealed, because if a person sends a letter, although carefully sealed, say, to a merchant at his office, knowing that the merchant has a staff of clerks who in the ordinary course of business open all letters sent to the merchant's office, that would be clearly a publication if the letter were opened and perused by a clerk in that way, even although that letter were most carefully sealed. Then, again, in the other case to which reference was made (*Gomersall* v. *Davies* (4)) the question raised on appeal was whether there was evidence of the publication of the libel. What had happened was that the plaintiff was a man engaged in the business of a game and poultry salesman, and evidence was given that, in the ordinary course, letters addressed to him would be opened by his clerk or foreman and brought to him in the market, and then A. L. SMITH, L.J., dealt with it on appeal in this way: The question being whether there was evidence of publication, he said:

> "The jury, in answer to questions put to them, found that the plaintiff's business was such that to the defendant's knowledge letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment."

In the face of that finding, how can it be said that it was an accidental publication? In each of those cases, therefore, there was evidence from which publication could be established by the fact that it was published in the way that the defendant must have been presumed to have intended it. Evidence of that sort is entirely wanting in the present case. Counsel for the plaintiffs urged that a letter inclosed in a wrapper or envelope of this sort must be treated as on the same footing as a postcard or as a telegram. I am quite unable to accede to that view. No doubt with regard to each of those documents, a postcard or a telegram, it was said by A. L. SMITH, L.J., in *Sadgrove* v. *Hole* (5) ([1901] 2 K.B.D. at p. 4):

> "It is certainly my opinion that if a man writes a libel on the back of a postcard and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited show that the two stand on the same footing";

but that is wholly different from a case where a communication is enclosed in an envelope, and cannot, without some unauthorised act, be withdrawn from the cover and perused. When I say "cannot," I mean is not, without some unauthorised act, withdrawn from the cover and perused. No doubt if the plaintiffs had been able to establish that the perusal of this communication was in the ordinary course by a person in discharge of his duty, the case would have been different; as, for instance, if he was able to show that it was withdrawn and perused by a Post Office official. In the Post Office regulations there are certain things which are prohibited from being sent through the post at all. There are other things as to which the public have a privilege of sending under a halfpenny stamp, but they are a limited class of things, and if the article, say a communication in the nature of a letter, is sent in this way, it is liable to be surcharged, and, in order to protect the Post Office, the Post Office officials have certain statutory powers. I see in the last edition of the Post Office Guide, under the inland post warrant of 1903, there is a provision that certain articles shall not be posted, or conveyed, or delivered by post, and then if they are, in breach of this regulation, tendered for transmission, transmission will be refused, or if they are detected in transit, they will be detained, and they are liable to be dealt with in such manner as the Postmaster-General may direct, and the sender is liable, in some cases, to prosecution. Although, therefore, persons in the employ of the Postmaster-General in the discharge of their duty may have to peruse and examine postal communi-

cations, and although a publication of a libel in that way would be established, there is no inference of fact or law to be drawn that, in all cases, communications of this sort are opened and read by the Post Office officials. A

In these circumstances I am of opinion that in the present case there was no evidence of publication to go to the jury, and the learned judge was right in the view that he took, and that the appeal on this point fails. That being so, it is not necessary to consider the other portion of the case. B

BRAY, J.—I am of the same opinion. The learned judge in this case withdrew the case from the jury on two grounds: First, that there was no evidence of publication by the defendant; and, secondly, that the words were not capable of being read in a defamatory sense.

I will deal with the first ground. The facts are not in dispute: This writing C was put in an envelope which was not closed or sealed: it was posted, and arrived in the ordinary course of post at the house where Mrs. Huth resided, and was opened by the butler; and the first contention of the plaintiffs was that that constituted a publication by the defendant. A publication it was, but the question was whether it was a publication by the defendant, or a publication of which he was responsible. It appears quite clearly from the butler's own evidence that he D knew, although this envelope was addressed to Miss Edith Greaves, that it was intended for his mistress, Mrs. Huth; he knew that perfectly well. Also there was nothing which would entitle him, in the ordinary course of his duty, to open that. He admitted that he did so from curiosity. There can be no doubt, in those circumstances, that the opening of that envelope, and the reading of the contents, was a wrongful act by the butler. In my opinion it is quite clear that, E in the absence of some special circumstances, the defendant cannot be responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated that; it was not the natural consequence of his sending that letter, or that writing, in the way in which he did. There are no such special circumstances here, and therefore, in my opinion, the publication, such as there was to the butler, was not a publication by the F defendant or a publication for which the defendant could be made responsible.

Then it was said that this matter was in an envelope and unsealed, and that, and that alone, was some evidence from which a jury would be at liberty to infer that it was in fact published, because they cannot give their verdict in favour of the plaintiffs without having evidence before them that there was a publication in fact. Now the only evidence that can be suggested is that there is a presump- G tion of fact from the fact that the letter was sent in the way in which it was sent. What is a presumption of fact? A presumption of fact arises from the high degree of probability of the existence of the fact. A familiar instance of a presumption of fact is the case of a man who is charged with larceny, and who is found in recent possession of the stolen goods. In that case there is a presumption of fact which affords evidence that the prisoner did in fact steal them, arising H from the high degree of probability, arising from the recent possession, that he did in fact steal them. Can there be such a presumption of fact here? The envelope was not like a postcard or a telegram; a distinct act of taking the contents out of the envelope was necessary. Is there any presumption of fact, is there any high degree of probability that that would occur in the course of transmission from the defendant through the post to Mrs. Huth? In my opinion certainly not. It is I said that the Postmaster-General, or those deputed by him, have the right to open an unsealed letter and read the contents, and see if they are in accordance with the Post Office regulations. I assume that. I have no doubt that it is so; but ought that to induce us to say that there is a high degree of probability that it would be so done? On the contrary, it is the barest possibility, and the barest possibility will not do. In my opinion there is no such presumption of fact, and there being no evidence which would justify the jury in saying that the defendant was responsible for the publication to the butler, the learned judge was right in

withdrawing the case, on that point, from the jury. As to the other point I do not desire to say anything, but it must not be understood, because I do not desire to say anything, that I, therefore, am dissenting in any way from the learned judge's judgment.

Appeal dismissed.

Solicitors: *Calder, Woods & Pethick*, for *Urry, Woods & Pethick*, Ventnor; *G. F. Hudson, Matthews & Co.*, for *Ragau Martin & Frend*, Tunbridge Wells.

[*Reported by* W. C. SANDFORD, Esq., *Barrister-at-Law.*]

Re MONOLITHIC BUILDING CO. TACON *v.* MONOLITHIC BUILDING CO.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Joyce, J.), February 25, 26, 1915]

[Reported [1915] 1 Ch. 643; 84 L.J.Ch. 441; 112 L.T. 619; 59 Sol. Jo. 332; 21 Mans. 380]

Company—Charge on property—Priority—Mortgage not registered within statutory period—Subsequent mortgage debenture duly registered—Notice by second mortgagee of first mortgage—Companies (Consolidation) Act, 1908, (8 *Edw.* 7, *c.* 69), *s.* 93.

An unregistered mortgage issued by a company **held** to be void under s. 93 of the Companies (Consolidation) Act, 1908 [see now s. 95 of the Companies Act, 1948], against a creditor who had a subsequent registered mortgage debenture charged on the company's property, although the creditor had notice of the unregistered mortgage.

Notes. The Companies (Consolidation) Act, 1908, s. 93, has been replaced by s. 95 of the Companies Act, 1948.

Referred to: *Re M.I.G. Trust, Ltd.*, [1933] Ch. 542.

As to the registration of charges, see 6 HALSBURY'S LAWS (3rd Edn.) 491 et seq.; and for cases see 10 DIGEST (Repl.) 810 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Le Neve* v. *Le Neve* (1747), Amb. 436; 1 Ves. Sen. 64; 3 Atk. 646; 27 E.R. 291, L.C.; 38 Digest (Repl.) 877, *898.*

(2) *Greaves* v. *Tofield* (1800), 14 Ch.D. 563; 50 L.J.Ch. 118; 43 L.T. 100; 28 W.R. 840, C.A.; 42 Digest 541, *1019.*

(3) *Edwards* v. *Edwards* (1876), 2 Ch.D. 291; 45 L.J.Ch. 391; 34 L.T. 472; 24 W.R. 713, C.A.; 7 Digest (Repl.) 111, *673.*

(4) *Davis* v. *Earl of Strathmore* (1810), 16 Ves. 419; 33 E.R. 1043; 42 Digest 760, *1860.*

(5) *Doe d. Ellis* v. *Owens* (1842), 10 M. & W. 514.

(6) *Re Toomer, Ex parte Blaiberg* (1883), 23 Ch.Dd. 254; 52 L.J.Ch. 461; 49 L.T. 16; 31 W.R. 906, C.A.; 42 Digest 670, *809.*

Also referred to in argument:

Ford v. *White* (1852), 16 Beav. 120; 51 E.R. 723; 35 Digest 454, *1951.*

Re Cardiff Workmen's Cottage Co., Ltd., [1906] 2 Ch. 627; 75 L.J.Ch. 769; 95 L.T. 669; 22 T.L.R. 799; 50 Sol. Jo. 696; 13 Mans. 382; 10 Digest (Repl.) 816, *5309.*

Appeal from a decision of ASTBURY, J., in an action brought by the plaintiff Dame C. E. Tacon against the Monolithic Building Co., Ltd., J. H. T. Jenkins, and W. Calway, claiming a declaration that a mortgage granted to her by the company on Mar. 3, 1913, had priority over a subsequent, registered mortgage debenture and a sub-mortgage thereof held by the last two defendants. The company appeared, but put in no defence and as against them judgment went in default. ASTBURY, J., held that the plaintiff was entitled to priority and the defendant J. H. T. Jenkins appealed.

J. W. Manning for the defendant.
Frank Russell, K.C., and *Lyttelton Chubb* for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal from a decision of ASTBURY, J., and it raises a point which has never been authoritatively decided before. It is undoubtedly of importance, but counsel have not brought to light any authority which expressly decides the question before us. It turns upon the true meaning of s. 93 of the Companies (Consolidation) Act, 1908 [now s. 95 of the Companies Act, 1948.]

The defendant company is a limited company subject to the provisions of that Act. It acquired some property in Hertfordshire, and executed a mortgage on Mar. 3, 1913, in the ordinary form for an advance of £500. That mortgage was not registered within the period required by the section. It was registered afterwards, but not registered within the statutory period. The omission to register it was not due to any fraud. There was a mistake of the advisers, who thought that a mortgage on land did not require to be registered. There was a first mortgage debenture subsequent to that, which was registered, and there was a second mortgage debenture which was also registered. The fact that Jenkins, the defendant, had notice of everything that had taken place is quite clear. I never came across a case in which notice was so clearly proved. He was the managing director of the company. He had witnessed the execution of the mortgage deed, and, I think, was the person who affixed the company's seal, so that Jenkins had the clearest possible notice of the mortgage in respect of which the plaintiff claims. I should add—and this is all I need say about it—that subsequently—namely, on Mar. 27, 1914, three days before the writ in this action was issued—an order of the court was made extending the time for registering the plaintiff's mortgage until April 17, 1914, and the order was made without prejudice to the rights of the parties prior to the time such mortgage was actually registered.

I propose to consider the language of s. 93 [now s. 95 of the Companies Act, 1948] without having my mind influenced for the moment—I had almost said without having my mind poisoned for the moment—by consideration of any authorities or other Acts dealing with this question. This was a mortgage on land executed by a company, and s. 93 (1) enacts as follows:

> "(1) Every mortgage or charge created after July 1, 1908, by a company registered in England or Ireland and being either . . . shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable."

Jenkins was a creditor of the company in respect of his registered mortgage debenture. That is quite plain. The subsection which I have just read in effect says that, so far as any security under the property comprised in an unregistered

mortgage is concerned, it is to be void against the liquidator and any creditor of the company unless registered within the statutory period. What does that mean? I confess my inability to say anything else than this, that it means exactly what it says, that an unregistered mortgage is to be void against the creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section. It is void also against the liquidator in the event of a winding-up of the company. That is a contingency, however, which we need not consider here, and which might give rise to certain questions which have been stated and discussed in argument, but as to which I deliberately refrain from expressing any opinion. I am only dealing with this case, and only propose to deal with it, in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor.

It is argued that we ought to read this sub-section—contrary, as it seems to me, to its established construction and intent—as saying that an unregistered mortgage must be void against any creditor of the company except where he has had notice of the existence of that prior unregistered mortgage. I ask why? Notice is not material in the case of a creditor. I feel the greatest possible difficulty in saying that that doctrine can apply. I put aside altogether any question of fraud. The doctrine of the court in a case of fraud, of course, proceeds upon a different footing, and any security may be postponed if you can find fraud in its inception. But it is not fraud to take advantage of legal rights the existence of which may be assumed to be known to both parties. We are dealing here with a case where there has been the use of a common seal. Then it is said go back 170 years to *Le Neve* v. *Le Neve* (1); look at the decisions under the Middlesex Registry Act, 1708, and also, I think, certain other Acts. It was there held that there might be such an equity as would induce the court to say that an unregistered charge should not be postponed to a registered charge. In the first place, the language of that statute seems to me to be materially different. The preamble to the Act which is found in s. 1 is framed in this way:

> "Whereas by the different and secret ways of conveying lands tenements and hereditaments such as are ill disposed have it in their power to commit frauds and frequently do so by means whereof several persons (who through many years' industry in their trades and employments and by great frugality have been enabled to purchase lands or to lend moneys on land security) have been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances and not only themselves but their whole families thereby utterly ruined."

And it then provided that deeds not registered should be adjudged fraudulent or void against any subsequent purchaser for valuable consideration. In the great case of *Le Neve* v. *Le Neve* (1), where there was a solicitor who had been concocting a scheme by which the children of a first marriage should be defrauded and deprived of their security by means of a second marriage settlement on the second marriage, Lord Hardwicke held that notice to that person was notice to the second wife, and that in some respects she was affected by his fraudulent conduct. But I do not think that it would be correct to say that Lord Hardwicke's decision went simply upon the actual fraud in the concoction and carrying through of the arrangement.

That decision, and the decisions which have followed it, have, certainly for the last half century—I think for longer—been strongly dissented from by the courts, and have been followed with great reluctance by judge after judge. But they felt themselves not at liberty—in dealing with the Middlesex Registry Act on which this decision had been given, and on the interpretation of which many decisions had doubtless depended—to override Lord Hardwicke's decision, and they have in many cases followed it. I fail to see the reason why we should apply that principle to this subsection of the modern Act of Parliament—namely,

s. 93 (1) of the Act of 1908 [now s. 95 of the Companies Act, 1948] which I have previously read.

Then it is said that the Court of Appeal in *Greaves* v. *Tofield* (2), in the year 1880, really adopted the same principle. It is necessary to look at that case. It turned on the construction of the Judgments Act, 1855. There the section in question was s. 12, which enacts as follows:

> "And whereas by reason of the repeal in the last session of Parliament of the Act of the fifty-third year of King George the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rentcharges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: Be it therefore enacted by the authority aforesaid as follows: Any annuity or rent-charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode"—and other particulars—"shall be left with the senior master of the Court of Common Pleas. . . ."

It was held by the Court of Appeal, consisting of JAMES, MELLISH, and BAGGALLAY, L.JJ., that the words "lands intended to be affected thereby" did not apply where there was notice of an unregistered deed. But I personally do not feel much difficulty about that case for this reason: If you look at that section you see that it was the last section of an Act comprising several sections of which it was expressly said certain consequences shall follow notwithstanding any notice. S. 4 enacts that:

> "No judgment . . . shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding."

If you go to s. 5, which deals with protections against judgments not registered, it is again provided that

> "so that notice of any judgment, decree, order, or rule, not duly re-registered, shall not avail against purchasers, mortgagees, or creditors."

S. 10 says that no order of the Court of Bankruptcy shall affect lands unless it is registered,

> "any notice of any such order to any such purchaser, mortgagee, or any creditor in anywise notwithstanding."

Then you come to s. 12 in which there is a remarkable omission of any reference to the absence of notice. In those circumstances the court held, differing from SIR GEORGE JESSEL in the court below, that there was no contradiction in that case under s. 12, and that the fair meaning of that section was that the old equitable doctrine which has been applied in these matters for many years was deliberately not intended to extend to a case in which those words were not put in which were correctly inserted in ss. 3, 4 and 5. Whether that was or was not sufficient to justify the decision, I cannot say; it certainly was a point in the case which distinguishes it from the present case.

But is that the only case we ought to consider? I think not. There is another decision of the Court of Appeal in *Edwards* v. *Edwards* (3) under the Bills of Sale Act, 1882, which is a modern Act, and it was there argued that a bill of sale not registered ought to be good as against a judgment creditor who had notice of its

existence, and *Le Neve* v. *Le Neve* (1) was cited. James, L.J., before referring to the language of the Bills of Sale Act, said (2 Ch.D. at p. 295):

> "I think it would be dangerous to engraft an equitable exception upon a modern Act of Parliament. The Act provides that a bill of sale shall be registered within twenty-one days, 'otherwise such bill of sale shall as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorising the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale . . .' "

A little later on he says (ibid. at pp. 295, 296):

> "The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I. You knew that if I issued execution your security would be of no avail as to chattels of which you had not taken possession. I knew that my remedy against those chattels was liable to be defeated by your taking possession before I seized them in execution. You knew that your security was liable to be defeated by my taking them in execution before you took possession.' Both parties stood on their legal rights—neither of them was misleading the other."

It is not consistent with the policy of the legislature to import fine equitable distinctions into these cases, and I am therefore of opinion that the argument founded on the knowledge of the judgment creditor cannot prevail. Mellish, L.J.'s judgment is, if possible, still more in point. He says (ibid. at p. 297):

> "Then it is urged that although this instrument, which was a bill of sale within the Act, was not registered, it is good against the execution creditor, because he had notice of it when his debt was contracted. Notice he clearly had, but does that take the case out of the Act? I am of opinion that at law it clearly would not be held to do so."

Then later on he says (ibid.):

> "Then is a court of equity to act differently? I agree with the Lord Justice James that we ought not to put such constructions on modern Acts of Parliament. If the legislature says that a deed shall be 'null and void to all intents and purposes whatsoever,' how can a court of equity say that in certain circumstances it shall be valid? The courts of equity have given relief on equitable grounds from provisions in old Acts of Parliament [obviously referring to the Registry Acts] but this has not been done in the case of modern Acts, which are framed with a view to equitable as well as legal doctrines."

Can any distinction be drawn because it is void to all intents and purposes? If a deed is said to be void against the first and second incumbrancers, what is the use of saying void to all intents and purposes? Of course the deed is not void to all intents and purposes. It is a perfectly good deed against the company so long as it is a going concern. It is not void to all intents and purposes, but it is void as between the two incumbrancers. It is rather strange, but *Edwards* v. *Edwards* (3) was not cited in *Greaves* v. *Tofield* (2). I have difficulty in distinguishing the principle which guided the court in those two cases, unless the distinction is based upon those two sections to which I have referred. As between those two authorities I certainly prefer *Edwards* v. *Edwards* (3), and I think that the principle there laid down of the old equitable doctrine of *Le Neve* v. *Le Neve* (1) and subsequent cases which have followed it, ought not to be applied or extended to modern Acts of Parliament. For those reasons I think that the

decision of the learned judge in the court below was wrong, and that this appeal ought to be allowed.

PHILLIMORE, L.J.—I am of the same opinion. No case was made of fraud on the part of the defendants, and we need not consider and cannot consider in this case whether or not the plaintiff has any remedy against Jenkins for negligence or misconduct in his independent office of managing director of this company. We have to construe s. 93 of the statute [now s. 95 of the Companies Act, 1948]. It makes void a security, not the debt, not the cause of action, not the simple contract debt; but it makes void the security, not against everybody, not against the company grantor, but against the liquidator and against any creditor. It leaves the security to stand against the company while it is a going concern. It does not make the security binding on the liquidator as successor of the company.

There are three ways in which documents, or three degrees to which instruments, may be void. They may be void together, like a bill of sale under £30 under the Bills of Sale Act, 1882; they may be void as to the security and good as to the obligation; and they may be void against certain parties only. But in each of those cases they are quoad a particular transaction void, and the matter is not made stronger by saying "to all intents or purposes" or any phrase of that kind. It is suggested here that the defendant Jenkins' knowledge of the mortgage precludes him from insisting upon his rights as a registered holder of debentures. I answer in the terms of *Edwards* v. *Edwards* (3), which has been already quoted by the Master of the Rolls, but which I must just briefly read because I am not going to put any other answer in my own language: "The mortgagee says to the execution creditor, 'You are not prejudiced, for you knew of my security.' The execution creditor replies, 'I knew that you had a security, but you knew the law as well as I.' " I omit the next words, because they have already been cited. "Both parties stood on their legal rights—neither of them was misleading the other." That is this case upon the facts as found.

The difficulty in our way is, no doubt, the case of *Greaves* v. *Tofield* (2). In that case they had three explanations given for it, any one of which will let it stand with the principle laid down in *Edwards* v. *Edwards* (3). *Greaves* v. *Tofield* (2) was decided on the ground that there was exactly the same phrase in the Act in question (Judgments Act, 1855) as in the Act of 4 & 5 William and Mary, c. 20. When I say exactly, I mean for all material purposes. "Shall not affect any lands or tenements" are the words of the Judgments Act, 1855. "No judgment not docketed shall affect any land or tenements" says s. 3 of the Act of 4 & 5 William and Mary, c. 20, upon which the decision in *Davis* v. *Earl of Strathmore* (4) was given, the case which has been followed ever since. That is the first observation to make. Secondly, the mischief in each case is recited in the same way, as also in the Middlesex Registry Act, 1708. It is the mischief that the second incumbrancer or purchaser will be deceived by absence of knowledge of the first, a mischief which cannot ensue if he in fact knows. I omit the subtleties of constructive notice for this purpose. It cannot arise if he in fact knows. The third point is what the Master of the Rolls has already pointed out, that when the legislature has intended in that Act that knowledge or notice shall prevent a subsequent purchaser or incumbrancer from relying on non-registration, the legislature has said so in three other sections, omitting it in this. Therefore, on this ground, *Greaves* v. *Tofield* (2) may well stand as a decision—and, of course, we cannot overrule it—upon the particular Act of Parliament there before the court without being in any way in conflict with the broader language of *Edwards* v. *Edwards* (3).

What principle does the plaintiff in the present case contend for? There are only two ways in which this matter can be put. The first is, the object of the registration is to prevent people advancing money or purchasing in the dark. It is in order that people who do not know shall not be affected by a prior assurance.

If they do know, the mischief disappears, and therefore, although there is no such phrase in the Act, it does apply to such cases. The other is quite a different principle. The other makes the subsequent incumbrancer trustee for the first incumbrancer, and that is really the view in *Le Neve* v. *Le Neve* (1) which LORD HARDWICKE puts upon dolus malus and what he calls (quoting from the civil law) "machinationem ad circumveniendum," and in the particular case—and I do not say his authority would go further, or that it has been quoted as going further —there was that very thing. If B. knows of an incumbrance on Black Acre already effected in favour of A., he may take a second incumbrance without intending to destroy A.'s incumbrance, when he takes it thinking that there will be sufficient security for both, and when he finds that there will not be sufficient for both he may effect registration of his incumbrance knowing that the other has not been registered, with a view to getting as much advantage as he can. There is no fraud in that. He is standing on his legal rights. But if A. has a conveyance of the whole property, and B. takes a second conveyance of the whole property knowing that A.'s is not registered, and promptly registers, then his endeavour from the beginning has been to destroy that which he knows was an honest transaction though not protected by law. It is the same, of course, if, knowing that A. has a conveyance of the whole property, he takes a mortgage which partially affects A, or if, A. having a mortgage, B. takes a conveyance which will defeat A.'s mortgage, and that is what happened in *Le Neve* v. *Le Neve* (1). It was not that the registration was effected in order to gain an advantage. It was that the whole inception of the transaction was to create an assurance which would defeat what the party intending to benefit by it knew was really an honest transaction. In that case, I assume that the manner in which the matter would be worked out would be by making the second person trustee of his advantages in favour of the first, at any rate as to third persons coming later, but, if that is not the case, then all that can be said is that the second person is postponed to the first because he is taken to have known of the first all along. The way of working out an administration of the assets if there was a liquidation, and if there were other creditors coming in, would be, it seems to me, difficult in both those cases, and extremely difficult in the case where, as in this case, there was no fraud at all.

On all these grounds it seems to me that the best thing is to go to the plain words of the statute. This document as against any creditor is void. The defendant here is a creditor, and therefore as against him it is as if it did not exist. Let us not import any consideration which may be applicable, or which it might be desirable to make applicable, where there is dolus malus, but which in any other case certainly neither are applicable, nor should be made applicable. Therefore I agree that this appeal should be allowed.

JOYCE, J.—This appeal, it appears to me, raises an important general question, and that is whether a creditor, in this case a secured creditor, who at the time of his debt being contracted, or taking his security, had notice of a prior security on the company's property unregistered, is thereby precluded from setting up s. 93 of the Companies (Consolidation) Act, 1908 [now s. 95 of the Companies Act, 1948] against such prior security.

In my opinion, it would be most unfortunate, and lead to endless difficulty and confusion, if the decision of the court below in this case were to stand. We have to consider the plain, or certainly tolerably plain, words of a recent Act of Parliament. There is a saying of PARKE, B., in *Doe d. Ellis* v. *Owens* (5), with reference to the construction of Acts of Parliament, which I should like to cite (10 M. & W. at 521):

> "It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or an uniform series of decision had already established a particular construction.

I do not think any of the cases cited of sufficient weight to preclude us from putting our own construction on the words of the statute."

There are also some observations of SIR GEORGE JESSEL very similar to what we constantly hear about the construction of wills in *Re Toomer, Ex parte Blaiberg* (6), which was a bill of sale case. He says (23 Ch.D. at p. 257):

"Whatever view we take of this case the result will be a singular one, and one which was probably not contemplated by the legislature. I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can clearly have only one meaning, we ought to give effect to it accordingly. If instead of doing that we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half a dozen older Acts, and, after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."

This is a modern Act passed only the other day. I will not re-read what the Master of the Rolls has read from MELLISH, L.J.'s judgment, which has never been questioned or criticised in any respect, but those observations in his judgment are to my mind very much in point in this case. I think that before getting lost in any wilderness of authorities, or a multitude of exceptions, we ought to look at the Act itself, and I think the Act is perfectly plain. The Act itself does not say that any charge shall be void altogether, but it specifies in the most precise and complete manner—it takes ten lines to do it—it prescribes in the most precise and particular manner the extent to which the other charges are to be avoided.

Upon that specification the respondent seeks to set up a qualification, or rather to insert an exception among the creditors. He wants to insert an exception from the creditors there mentioned "with the exception of creditors who have notice of the prior charge." Having regard to that contention, it is not unimportant—in fact it is, indeed, important—to remember that the statute avoids the charge as against the liquidator. Now, he of all persons is the person who has notice. The company—and he represents the company—has notice of the charge. If the charge unregistered is to be void as against him, I myself have great difficulty in seeing what would be the sense of making it not void as against some other creditors. And I should also have great difficulty in seeing how the thing works out if we assented to the construction sought to be placed on this by the respondents. I myself have great difficulty in seeing how it would work in a winding-up. Practically, in my opinion, it would be unworkable, and for my own part I could not sanction the engrafting on these plain words of the Act a very ingenious limitation, which in the result, in my opinion, would render this Act unworkable and absurd. I think this section of the Act means exactly what it says, and that it is not subject to any such exception as has been suggested by the respondent in this case.

Appeal allowed.

Solicitors: *C. B. Cottam*; *Farrar, Porter & Co.*, for *Bertram R. Yorke*, Eye, Suffolk.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

GOLDSOLL *v.* GOLDMAN

[Court of Appeal (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), December 17, 1914]

[Reported [1915] 1 Ch. 292; 84 L.J.Ch. 228; 112 L.T. 494; 59 Sol. Jo. 188]

Contract—Illegality—Public policy—Restraint of trade—Unreasonable area of restraint—Covenant not to be interested directly or indirectly in business of "real or imitation jewellery"—Severability of covenant—Enforcement as limited in two respects.

The defendant agreed with the plaintiffs, who were dealers in mainly imitation jewellery, that he would not for a period of two years directly or indirectly be concerned or interested in or render services to the business of a vendor or dealer in real or imitation jewellery, "in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin or St. Stefan's Kirche, Vienna."

Held: (i) the area of restraint was unreasonable and should be limited to the United Kingdom and the Isle of Man; (ii) the covenant should be limited to what was necessary for the protection of the plaintiff's business and so should be limited to imitation jewellery only; and (iii) the doctrine of severability applied, and the covenant as limited in these two respects was enforceable against the defendant.

Order of Neville, J., [1914] 2 Ch. 603, varied.

Notes. Considered: *Express Dairy Co., Ltd.* v. *Jackson*, [1929] All E.R.Rep. 327. Referred to: *Herbert Morris, Ltd.* v. *Saxelby*, [1915] 2 Ch. 57; *Attwood* v. *Lamont*, [1920] All E.R.Rep. 55; *Putsman* v. *Taylor*, [1927] All E.R.Rep. 356; *Morris, Ltd.* v. *Gilman, Ltd.* (1943), 60 R.P.C. 20.

As to restraint of trade by agreement in general, see 32 Halsbury's Laws (2nd Edn.) 397 et seq.; and for cases see 43 Digest 21 et seq. As to severability of a covenant in restraint of trade, see 32 Halsbury's Laws (2nd Edn.) 427–430; and for cases see 43 Digest 46 et seq.

Case referred to:

(1) *Mason* v. *Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 29 T.L.R. 727; 57 Sol. Jo. 739, H.L.; 43 Digest 22, *143*.

Also referred to in argument:

Price v. *Green* (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 153 E.R. 1222; sub nom. *Green* v. *Price*, 9 L.T.O.S. 296, Ex. Ch.; 43 Digest 47, *486*.

Haynes v. *Doman*, [1899] 2 Ch. 13; 68 L.J.Ch. 419; 80 L.T. 569; 15 T.L.R. 354; 43 Sol. Jo. 553, C.A.; 43 Digest 24, *158*.

Appeal by the defendant from an order of Neville, J.

The facts are set out in the headnote and the judgments.

Rigby Swift, K.C., and *Lincoln Reed* for the defendant.

Jenkins, K.C., and *Vernon* for the plaintiffs.

LORD COZENS-HARDY, M.R.—This is an appeal from Neville, J., and the question is whether a covenant entered into between Goldsoll and Goldman is unreasonable as it stands; and, if it is, whether it is severable, so that it may be good in part and bad in part.

The plaintiffs are carrying on the business of dealers in imitation jewellery. They do not carry on business in real jewellery, and I say this, although some of

the articles sold are of real gold in which Teccla pearls or other stones are set, while occasionally the imitation pearls or stones have a setting of real diamonds. Substantially, the business is in imitation jewellery. In 1912 Goldman was carrying on a business in competition with Goldsoll, and the agreement in question was entered into with the object of putting an end to the competition. There was ample consideration for the agreement, and by the clause of the deed which we have to consider Goldman covenanted with Goldsoll that he would not for a period of ten years (which was reduced by a subsequent agreement to two years)

> "either solely or jointly with or as agent or employee for any person or company, directly or indirectly carry on or be engaged, concerned, or interested in or render services (gratuitously or otherwise) to the businesss of a vendor of or dealer in real or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man, or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefan's Kirche, Vienna."

Notwithstanding this covenant, Goldman has, according to the finding of the learned judge in the court below, been assisting and rendering services to a co-defendant who is carrying on a business identical with the plaintiffs' in the same street. It is perfectly clear that there has been a breach of the covenant. But that is not conclusive of the case, for what we have to consider is whether the covenant he has infringed can be treated as good, either in whole or in part, and can be enforced.

On the question of the space covered by the covenant, NEVILLE, J., has held, and I entirely agree with him, that it is unreasonably large, in so far as it is intended to cover not merely the United Kingdom and the Isle of Man, but also the foreign countries mentioned in the covenant. He has also held—and his decision is consistent with a long series of authorities—that the covenant can be severed as regards the space covered by it. It is clear that part of the covenant dealing with the area is reasonable, and the learned judge in the court below has limited the injunction which he has granted to "the county of London, England, Scotland, Ireland, and Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man." That such a covenant is severable in this respect has been decided by authorities nearly two hundred years old.

No objection is taken, or could be taken, with regard to the limit of time. But the further difficulty has been raised that while the business of the plaintiffs was, as I have said, a business in imitation jewellery, the covenant is against carrying on or being engaged, concerned, or interested in "the business of a vendor of or dealer in real or imitation jewellery." It is admitted that the business of a dealer in real jewellery is not the same as that of a dealer in imitation jewellery. There are many shopkeepers who would be insulted if they were asked whether they sold imitation jewellery. That being so, it is difficult to support the whole of this provision, for the covenant must be limited to what is reasonably necessary for the protection of the covenantee's business.

Then comes the question whether the doctrine of severability is applicable to this part of the covenant. In my opinion it is, and the covenant is good in so far as it purports to restrain the covenantor from carrying on business in imitation jewellery.

The result is that, in my opinion, the order of NEVILLE, J., is right, with the exception that the words "real or" ought to be omitted from the injunction granted by him. The appeal fails on the matter as to which the plaintiffs alone complained, and it must be dismissed.

KENNEDY, L.J.—I entirely agree. The facts are not in dispute between the parties so far as they affect the particular question that we have to consider—namely, the propriety of the injunction granted by NEVILLE, J. It is not dis-

puted that there was evidence to justify NEVILLE, J., in holding that the defendant is a person who has, in breach of his covenant, been assisting or working for a person who is a vendor of or dealer in imitation jewellery. In so far, therefore, as dealing in imitation jewellery is concerned, it is clear that the injunction granted would be right, subject only to the question raised as to the unreasonableness of the covenant as being too large a restraint of trade. As the Master of the Rolls has pointed out, it is no use now to consider whether, when a person chooses to take from another a covenant in restraint of trade larger than is necessary for the protection of his business, the contract may not be enforced against the covenantor in respect of the part of the restraint required for the protection of the covenantee. The doctrine of severability has been admitted by the courts, and, while I am far from saying that I do not see the force of the great objections brought forward by LORD MOULTON in *Mason* v. *Provident Clothing and Supply Co., Ltd.* (1), and by NEVILLE, J., in the present case, it is no use going into that because it has been held in authorities binding on this court that, if words are used in a covenant such as admit of severability by mentioning different areas, we must sever the covenant so as to limit it to an area which is not too large. Moreover, if ever there was a case of severability, we have it in the present case, for countries are specified which may be treated as representing the United Kingdom as distinguished from foreign countries. There is, therefore, no sound objection to holding, as NEVILLE, J., has done, that severed in that way there is a reasonable part to the contract which ought to be enforced in favour of the plaintiffs.

It remains to deal with the nature of the business in respect of which the restrictive covenant has been taken. It relates to "the business of a vendor of or dealer in real or imitation jewellery." It is not really disputed that the essential and sole business which the covenant was intended to protect was that of a dealer in imitation jewellery in the sense that the articles sold were never real in their entire composition; and that the central portion by which they would naturally be described—as, for instance, a ruby ring or a pearl necklace—was not real. It is against dealing in goods of that kind that the plaintiffs ought to be protected; and as we can here, by reason of the language, sever "vendor of or dealer in real or imitation jewellery," we ought to do so, and limit the injunction to dealing in imitation jewellery, striking out the words "real or." This limitation of the injunction would not protect the defendant if he were to go into a business part imitation and part real, but he would still come within the words of the injunction. I agree, therefore, that the order of NEVILLE, J., should be modified as the Master of the Rolls has already said, and I agree that this modification should not affect the way in which the costs of the appeal are to be borne. The defendant Goldman has been doing the very thing which would be a breach of the covenant if the words "real or" had been omitted. He has no merits, and we are able to do that which prevents even the suggestion of any unreasonable restriction.

SWINFEN EADY, L.J.—This appeal raises two points. It is said that the covenant is invalid, owing to the area to which it applies being too wide; and the nature of the business to which it relates also being too wide. This is not a case between master and servant, but between vendor and purchaser. The plaintiffs purchased the defendant's business in order to prevent competition by the defendant. The covenant provided that the covenantor was not to carry on business in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man, or in France, the United States of America, Russia, or Spain, or within twenty-five miles of Potsdamerstrasse, Berlin, or St. Stefan's Kirche, Vienna. NEVILLE, J., has held it to be valid as regards the United Kingdom, and the defendant contends that this is wrong. In my judgment the covenant is clearly severable as regards area, and the provision against trading in the United Kingdom is not wider than is reasonable for the protection of the covenantee. The business is carried on mainly by

advertisement in illustrated papers in the United Kingdom, and business is obtained from Scotland and other places as well as from England itself. As much as £6,000 a year is spent on advertising. I am of opinion that the restriction to the United Kingdom is not excessive as regards area, and that, as the covenant is severable, it is valid to that extent.

There is a further point, however, with regard to the nature of the business. The agreement in question states that both the parties to it were carrying on business in real and imitation jewellery, and the business has been described as one in which the imitation jewels used may be set with small real diamonds and are usually set in gold or platinum. That is what the parties meant by the business in real and imitation jewellery. But in the operative part of the deed the covenant is not expressed in the same language. It is a covenant not to

> "carry on, or be engaged, concerned, interested in, or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real or imitation jewellery . . ."

And it is argued that this might extend to prevent dealing in real jewellery alone. When this was pointed out, the plaintiffs at once expressed their willingness to have the injunction modified so as to apply only to dealing in imitation jewellery. The words "real or" will therefore be struck out of the injunction granted by NEVILLE, J. The injunction so limited will extend to a dealing in imitation jewellery in the sense in which the words have been used in court, and will include a dealing in jewellery which is partly real and partly imitation. Subject to this variation in the order, I think the appeal fails, and must be dismissed.

Order varied.

Solicitors: *W. B. Glasier*; *J. R. Cardew Smith.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

PUDDEPHATT *v.* LEITH

[CHANCERY DIVISION (Sargant, J.), December 17, 1915]

[Reported [1916] 1 Ch. 200; 85 L.J.Ch. 185; 114 L.T. 454; 32 T.L.R. 228; 60 Sol. Jo. 210]

Injunction—Mandatory injunction—Restraint of breach by mortgagee of shares of agreement to vote in accordance with wishes of mortgagor.

The defendant made an advance to the plaintiff upon the security of some shares which were transferred into his name. The defendant agreed to "vote in all cases, when a vote is necessary in respect of these shares, as you wish me to do." Subsequently, the defendant voted at a company meeting against the wishes of the plaintiff and indicated his intention of doing so again at the next company meeting.

Held: (i) the undertaking to vote in accordance with the plaintiff's wishes was a binding collateral agreement; (ii) as there was one definite thing to be done about which there could be no doubt the court would grant a mandatory injunction as well as a prohibitive injunction to compel the defendant to vote as required by the plaintiff at future company meetings.

Herman Loog v. *Bean* (1) (1884), 26 Ch.D. 306, and *Wolverhampton Corpn.* v. *Emmons* (2), [1901] 1 K.B. 515, applied.

Notes. Referred to: *I.R.Comrs.* v. *Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667; *I.R. Comrs.* v. *Silverts, Ltd.* [1950] 2 All E.R. 271.

As to voting at company meetings in general, see 6 HALSBURY'S LAWS (3rd Edn.) 338–340; and for cases see 9 DIGEST (Repl.) 608 et seq. As to mandatory injunctions in general, see 21 HALSBURY'S LAWS (3rd Edn.) 361 et seq; and for cases see 28 DIGEST (Repl.) 772 et seq.

Cases referred to:

(1) *Hermann Loog* v. *Bean* (1884), 26 Ch.D. 306; 53 L.J.Ch. 1128; 51 L.T. 442; 48 J.P. 708; 32 W.R. 994, C.A.; 28 Digest (Repl.) 775, *272*.

(2) *Wolverhampton Corpn.* v. *Emmons*, [1901] 1 K.B. 515; 70 L.J.K.B. 429; 84 L.T. 407; 49 W.R. 553; 17 T.L.R. 234; 45 Sol. Jo. 256, C.A.; 7 Digest (Repl.) 416, *306*.

Motion with witnesses which by consent was treated as the trial of the action. The facts are set out in the headnote and in the judgment.

Romer, K.C., and *Beebee* for the plaintiff.

H. E. Wright for the defendant.

SARGANT, J.—Early in the year 1913 the defendant agreed to advance money to the plaintiff on the security of 500 fully paid shares in a limited company of which she was the holder. The agreement for the advance was dated Feb. 14, 1913, but the defendant had previously, on Jan. 20, 1913, written to the plaintiff the following letter:

> "I should have mentioned to you to-day that your voting rights in virtue of the shares held in mortgage by me during the period of the loan will be untouched. Though the shares will be in my name and my voice may give the votes, I shall give no such vote without first consulting you. I shall vote in all cases, when a vote is necessary in respect of these shares, as you wish me to do. This proviso will not be mentioned in the agreement, but you can preserve this note if you like."

The shares were transferred into the name of the defendant. Disputes have now arisen in regard to the management of the affairs of the company, and at a general meeting the defendant has voted in respect of the shares against the wishes of the plaintiff. As he has indicated his intention so to vote at another approaching general meeting of the company, the plaintiff commenced this action claiming an injunction restraining the defendant from voting in respect of the mortgaged shares otherwise than as directed by her, and an injunction ordering him to vote in respect of the shares at any poll to be taken at the approaching general meeting or any adjournment of it against a certain resolution and in favour of certain other resolutions. This was a motion to enforce the injunction and by consent was treated as the trial of the action.

It is clear that the undertaking to vote in accordance with the plaintiff's wishes contained in the letter of Jan. 20, 1913, constituted a collateral agreement binding on the defendant. In my opinion, therefore, the right of the plaintiff is clear, and the only remaining question is whether she is entitled to a mandatory injunction to enforce her right. It is not disputed that she is entitled to a prohibitive injunction, and in my opinion she is also entitled to a mandatory injunction. Primâ facie this court is bound, as COTTON, L.J., said in *Herman Loog* v. *Bean* (1) to give effect to a clear right by way of a mandatory injunction. There are, no doubt, certain exceptions to this rule, as in the case of a contract of service, because in such cases it is impossible for the court to make its order effective; but in *Wolverhampton Corpn.* v. *Emmons* (2) a mandatory injunction was granted to compel the defendants to build in accordance with certain plans; and in the present case, inasmuch as there is only one definite thing to be done about which

there can be no possible doubt, I am of opinion that I ought to grant not only the prohibitive but also the mandatory injunction claimed by the plaintiff, and I make an order accordingly.

Solicitors: *Hatchett Jones & Co.; Field, Roscoe & Co.*, for *Pinsent & Co.*, Birmingham.

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

R. *v.* SMITH

[COURT OF CRIMINAL APPEAL (Lord Reading, C.J., Darling and Lush, JJ.), July 29, 1915]

[Reported 84 L.J.K.B. 2153; 114 L.T. 239; 80 J.P. 31; 31 T.L.R. 617; 59 Sol. Jo. 704; 25 Cox, C.C. 271; 11 Cr. App. Rep. 229]

Criminal Law—Evidence—Similar acts subsequent to indicted offence—Admissibility.

Criminal Law—Evidence—Privilege—Consultation between accused and solicitor—Information sought showing client whether commission of crime desirable.

Criminal Law—Trial—Summing-up—Theory put forward by judge as to how deceased died not suggested by either prosecution or defence.

The appellant was indicted for the murder of M. who had been discovered dead in her bath after having gone through a ceremony of marriage with him. At the trial evidence was given that subsequently to the death of M. two other women had died in their baths in similar circumstances after having gone through marriage ceremonies with the appellant. Evidence was also given of a consultation between the appellant and a solicitor concerning, inter alia, the effect in law of a voluntary settlement made by M. and whether the trustees could buy an annuity without M.'s permission. The trial judge in the course of his summing-up to the jury put forward a new theory as to how the deceased was drowned which had not been previously suggested by either the prosecution or the defence.

Held: (i) as there was primâ facie evidence that the appellant had committed the act charged, evidence of similar acts was admissible, including evidence of the circumstances relating to the deaths of the two women; (ii) evidence was rightly admitted of the consultation between the appellant and a solicitor, as such evidence was admissible when an accused person asked his solicitor for information which would show him how he could commit the offence or whether it was necessary or desirable to commit it: *R.* v. *Cox and Railton* (1) (1884), 14 Q.B.D. 153, applied; (iii) it would have been better if the judge had not put forward a new theory, but he was right in telling the jury that they must come to their own conclusions on that theory.

Notes. Considered: *R.* v. *Harrison-Owen*, [1951] 2 All E.R. 726; *Harris* v. *D.P.P.*, [1952] 1 All E.R. 1044; *R.* v. *Dawson*, [1960] 1 All E.R. 558. Referred to: *Godman* v. *Times Publishing Co.*, [1926] 2 K.B. 273.

As to evidence of similar facts, see 15 HALSBURY'S LAWS (3rd Edn.) 291–293; and for cases see 22 DIGEST (Repl.) 66 et seq. As to privilege between client and legal adviser, see 15 HALSBURY'S LAWS (3rd Edn.) 421 and ibid., Vol. 10, pp. 479–480, and ibid., vol. 12, p. 39 et seq.; and for cases see 22 DIGEST (Repl.) 399 et seq.

Cases referred to:

(1) *R.* v. *Cox and Railton* (1884), 14 Q.B.D. 153; 54 L.J.M.C. 41; 52 L.T. 25; 49 J.P. 374; 33 W.R. 396; 1 T.L.R. 181; 15 Cox, C.C. 611, C.C.R.; 14 Digest (Repl.) 491, *4749*.

(2) *Makin* v. *A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 10 T.L.R. 155; 17 Cox, C.C. 704; 6 R. 373, P.C.; 14 Digest (Repl.) 420, *4094*.

Also referred to in argument:

R. v. *Ball*, *R.* v. *Ball*, [1911] A.C. 47; 75 J.P. 180; sub nom. *D.P.P.* v. *Ball* (*No. 2*), 80 L.J.K.B. 691; 103 L.T. 738; 55 Sol. Jo. 139; 22 Cox, C.C. 366; 6 Cr. App. Rep. 31, H.L.; 14 Digest (Repl.) 426, *4138*.

R. v. *Boyle and Merchant*, post; [1914] 3 K.B. 339; 83 L.J.K.B. 1801; 111 L.T. 638; 24 Cox, C.C. 406; 10 Cr. App. Rep. 180; sub nom. *R.* v. *Boyle*, *R.* v. *Merchant*, 78 J.P. 390; 30 T.L.R. 521; 58 Sol. Jo. 673, C.C.A.; 14 Digest (Repl.) 437, *4237*.

Perkins v. *Jeffery*, ante, p. 172; [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 31 T.L.R. 444; 25 Cox, C.C. 59, D.C.; 14 Digest (Repl.) 423, *4116*.

R. v. *Christie*, ante, p. 63; [1914] A.C. 545; sub nom. *D.P.P.* v. *Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 30 T.L.R. 471; 58 Sol. Jo. 515; 24 Cox, C.C. 249; 10 Cr. App. Rep. 141, H.L.; 14 Digest (Repl.) 405, *3962*.

R. v. *Baird* (1915), 84 L.J.K.B. 1785; 113 L.T. 608; 25 Cox, C.C. 86; 11 Cr. App. Rep. 186, C.C.A.; 14 Digest (Repl.) 422, *4111*.

Bullivant v. *A.-G. for Victoria*, [1901] A.C. 196; 70 L.J.K.B. 645; 84 L.T. 737; 50 W.R. 1; 17 T.L.R. 457; 45 Sol. Jo. 483, H.L.; 18 Digest (Repl.) 116, *988*.

Appeal against a conviction for murder before Scrutton, J., at the Central Criminal Court. The facts are set out in the headnote.

Marshall Hall, K.C., *Montague Shearman* and *H. Grattan Bushe* for the appellant.

A. H. Bodkin, *Travers Humphreys* and *Cecil Whiteley* for the Crown.

The judgment of the court was delivered by

LORD READING, C.J.—The appellant was convicted of the murder of Bessie Munday. His appeal to this court is based on points of law relating to the admission of evidence and to the summing-up of the judge at the trial. On the charge of murder preferred against the appellant, evidence was admitted showing that he murdered two other women at a later date. The first question raised by the appeal is whether the judge acted rightly in admitting evidence of the deaths of the two other women, Alice Burnham and Margaret Lofty.

The principles of law governing the admission of evidence of this nature have been often under the consideration of this court and depend chiefly on the statement of the law in *Makin* v. *A.-G. for New South Wales* (2), where Lord Herschell says ([1894] A.C. at p. 65):

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in his indictment were designed or

accidental, or to rebut a defence which would otherwise be open to the accused."

In the present case the prosecution tendered evidence relating to the other two women, and it was admitted by the judge as tending to show that the act charged was committed with design. It is sufficient to say that it is not disputed, and cannot be disputed, that if as a matter of law there was primâ facie evidence that the appellant committed the act charged, evidence of similar acts become admissible. We have come to the conclusion that undoubtedly there was as a matter of law primâ facie evidence that the appellant committed the act charged. The point, therefore, taken by the defence under this head fails.

The second point taken is that even assuming that evidence of the other two women was admissible, the prosecution should not have been allowed to give evidence beyond the fact that the two women were found dead in their baths. Obviously for the reasons given in dealing with the first point, it would not have been of any assistance to cut short the evidence in this way. We think that the prosecution were entitled to give, and the judge rightly admitted, evidence of the circumstances relating to the deaths of the two women.

Another point raised by the defence is that evidence was given and admitted of communications between a solicitor and his client which were privileged. We think that the evidence was rightly admitted in accordance with the principles laid down in *R.* v. *Cox and Railton* (1), which has been cited before us. The principle of law is well known that where communications are made by a prisoner to his solicitor, evidence of such communication is admissible when, as in the present case, the prisoner asked his solicitor for information which would show him how he could commit the offence, or whether it was necessary or desirable to commit it. The defence have made observations with reference to questions which were asked by the two doctors in the case. Looking at the questions it is obvious that they were asked on the assumption that certain facts were true, and the doctors were asked to exercise their skill and knowledge with regard to assumed facts.

It is also contended that the judge in summing up the case to the jury put forward a new theory relating to the mode of killing the woman, as to which it is said no suggestion had been made during the trial. While the case was being heard, suggestions as to how death had occurred were put forward by both the prosecution and the defence. The judge told the jury that they need not necessarily have regard to the exact way in which the deceased woman was killed if in fact they were satisfied that the accused killed her. It is not disputed that the woman's death was caused by drowning, and it was not necessary to prove the exact method so long as the jury were satisfied that the accused caused the death by drowning. It would, we think, have been better if the judge had not put forward a new theory, but we think he was right in telling the jury that they must come to their own conclusion as to a suggestion which he made in addition to a number of others. The court is of opinion that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *W. P. Davies*; *Director of Public Prosecutions.*

[*Reported by* R. F. Blakiston, Esq., *Barrister-at-Law.*]

CHANNEL COLLIERIES TRUST, LTD. *v.* DOVER, ST. MARGARET'S AND MARTIN MILL LIGHT RAIL. CO.

[Court of Appeal (Lord Cozens-Hardy, M.R., Swinfen Eady and Pickford, L.JJ.), July 8, 9, 1914]

[Reported [1914] 2 Ch. 506; 84 L.J.Ch. 28; 111 L.T. 1051; 30 T.L.R. 647; 21 Mans. 328]

Company—Director—Sole director—One director not quorum—Power of sole director to appoint new directors—Qualification—New directors not qualified by shareholding—Validity of acts done by them—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, c. 17), *ss.* 89, 99.

By s. 89 of the Companies Clauses Consolidation Act, 1845: "If any director die, or resign, or become disqualified or incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation . . . the remaining directors . . . may elect in his place some other shareholder duly qualified to be a director. . . ." By s. 99: "All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

Two of the three directors of the defendant company retired. The sole continuing director, although not constituting a quorum, appointed two new directors. Neither of these two directors at the date of their appointment held the necessary qualification shares, although they obtained them immediately after their appointment.

Held: (i) the continuing director though not constituting a quorum could validly appoint new directors by virtue of s. 89, and (ii) the acts of the de facto directors who were not qualified to be appointed were validated by s. 99 as they had acted in good faith.

Dawson v. *African Consolidated Land and Trading Co., Ltd.* (1), [1898] 1 Ch. 6, and *British Asbestos Co., Ltd.* v. *Boyd* (2), [1903] 2 Ch. 439, considered and applied.

Re Staffordshire Gas and Coke Co., Ltd., Ex parte Nicholson (3) (1892), 66 L.T. 413, overruled.

Decision of Sargant, J., [1914] 1 Ch. 568, affirmed.

Notes. Referred to: *Morris* v. *Kanssen*, [1946] 1 All E.R. 586.

As to the appointment of directors in general, see 6 Halsbury's Laws (3rd Edn.) 274 et seq.; and for cases see 9 Digest (Repl.) 451 et seq. For the Companies Clauses Consolidation Act, 1845, see 3 Halsbury's Statutes (2nd Edn.) 277.

Cases referred to:

(1) *Dawson* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6; 67 L.J.Ch. 47; 77 L.T. 392; 46 W.R. 132; 14 T.L.R. 30; 42 Sol. Jo. 45; 4 Mans. 372, C.A.; 9 Digest (Repl.) 451, *2965*.

(2) *British Asbestos Co., Ltd.* v. *Boyd*, [1903] 2 Ch. 439; 73 L.J.Ch. 31; 88 L.T. 763; 51 W.R. 667; 11 Mans. 88; 9 Digest (Repl.) 460, *3013*.

(3) *Re Staffordshire Gas and Coke Co., Ltd., Ex parte Nicholson* (1892), 66 L.T. 413; 9 Digest (Repl.) 460, *3008*.

(4) *MacDougall* v. *Gardiner* (1875), 10 Ch. App. 606; 32 L.T. 653; 23 W.R. 846, L.JJ.; 9 Digest (Repl.) 622, *4150*.

Also referred to in argument:

Howbeach Coal Co., Ltd. v. *Teague* (1860), 5 H. & N. 151; 2 L.T. 187; 6 Jur.N.S. 275; 8 W.R. 264; 157 E.R. 1136; sub nom. *Howbeach Coal Co.* v. *Teague*, *Howbeach Coal Co.* v. *Bennett*, 29 L.J.Ex. 137; 9 Digest (Repl.) 452, *2971*.

Kirk v. *Bell* (1851), 16 Q.B. 290; 117 E.R. 890; 9 Digest (Repl.) 546, *3598*.

Re Alma Spinning Co., Bottomley's Case (1880), 16 Ch.D. 681; 50 L.J.Ch. 167; 43 L.T. 620; 29 W.R. 133; 9 Digest (Repl.) 546, *3593*.

Re Allison, Johnson and Foster, Ltd., Ex parte Birkenshaw, [1904] 2 K.B. 327; 91 L.T. 66; 53 W.R. 285; 20 T.L.R. 493; sub nom. *Re Allison, Johnson and Foster, Ltd., Ex parte Carlill, Birkinshaw and Ferguson*, 73 L.J.K.B. 763, D.C.; 10 Digest (Repl.) 1050, *7280*.

Re R. Bolton & Co., Salisbury-Jones and Dale's Case, [1894] 3 Ch. 356; 64 L.J.Ch. 27; 71 L.T. 284; 10 T.L.R. 614; 1 Mans. 431; 7 R. 504, C.A.; 9 Digest (Repl.) 472, *3091*.

Appeal from a decision of SARGANT, J.

SARGANT, J., held that though the single continuing director had power under ss. 89 and 92 to appoint the two new directors, their appointment was invalid as they acquired the necessary qualification subsequently; but the allotment by the board of three directors, two of whom had been invalidly appointed was validated by s. 99. On the appeal the plaintiff sought an injunction restraining the two new directors from acting as directors or as shareholders of the defendant company in respect of the shares purported to have been allotted to them. The facts appear in the headnote and in the judgments.

Romer, K.C., and *R. Roope Reeve* for the plaintiff.
Martelli, K.C., and *H. S. Preston* for the defendants.

LORD COZENS-HARDY, M.R.—This appeal, although it comes on in the shape of an interlocutory question, raises a point of general importance to companies, whether they are limited liability companies or Parliamentary companies governed by the Companies Clauses Consolidation Act, 1845. The facts can, I think, very shortly be stated.

The defendant company is a light railway company incorporated in Aug., 1909. There were three directors, Sir W. H. Crundall, Sir W. D. Pearson (now Lord Cowdray), and Sir J. Jackson. The number of directors was originally five, but that number was reduced under a proper clause to three, so that there was a quorum of the directors. A quorum of directors was three, but if the number of directors was reduced to three the quorum was to be two. There was a qualification of shares for the directors. For reasons which do not concern us Sir W. D. Pearson and Sir W. H. Crundall were minded to retire. They transferred all their shares and they became no longer eligible to act as or to be directors of the company. What, then, was the position of the company? It was a company with Sir J. Jackson as sole director. What was his power? It seems to me that he had power under the Companies Clauses Consolidation Act, 1845, as being the continuing director, to fill up the vacancies on the board. The fact that a person exercising that power was less than the quorum is not really a relevant matter. The generality of the language used in the section is so clear that it is impossible for us to overlook it. Any other view on that point would paralyse many a company. It is very common indeed to have a company the directors of which are merely the quorum, and therefore, unless there is a power for the continuing director or directors to fill up the place, the companies would be at a deadlock; nothing could be done except by the intervention of the court in the manner suggested by MELLISH, L.J., in *MacDougall* v. *Gardiner* (4), an intervention which seems to me rather difficult to justify except on the sheer ground of absolute necessity. I think, therefore, that Sir J. Jackson had power to fill up the vacancies caused by the retirement of his two colleagues.

That, however, does not get over the difficulty. Assume that he had the power, he could only appoint persons who had the requisite qualification as shareholders. What he did on July 29 of last year was this: He purported to appoint J. Proffitt and A. Jackson directors, and at the same meeting or subsequently or on the same day the necessary qualification shares were allotted to those two persons. That was not in my opinion sufficient to make J. Proffitt and A. Jackson directors, because the subsequent obtaining of qualification shares did not validate the original appointment. But what happened was this: All the parties concerned, that is to say, Sir J. Jackson, J. Proffitt and A. Jackson, acting, according to the learned judge in the court below, and I see no reason to doubt it, in perfect good faith, were not aware of the invalidity of the appointment by want of qualification, and they honestly believed that it was sufficient if contemporaneously with, although in point of time immediately after, their appointment they obtained the qualification shares.

What is the principle which ought to be applied in a case like this? The relevant section is s. 99 of the Companies Clauses Consolidation Act, 1845, which enacts as follows: [His Lordship read s. 99 and continued:] That section, or a section in equivalent words, has been construed by this court, and by Farwell, J., as a judge of first instance in a manner which is binding upon us. It is binding so far as it is a decision of the Court of Appeal whether we agree with it or not, and so far as it is a decision of Farwell, J., it would be followed by us unless for good reason we came to the conclusion that it was wrong.

It has been held by the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) that s. 99 is not limited to dealings between the company and outsiders, but that it applies also to dealings between the company and persons who are inside the company. I am using a neutral word as far as I can. It has been also held by Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2) that the words "notwithstanding it may be discovered afterwards that there was some defect" do not mean merely notwithstanding that the facts which show the defect were afterwards made known, but that they mean notwithstanding that the defect itself, the defect arising from the facts, was afterwards discovered. That seems to me to be, if I may respectfully say so, plainly right. That is the view which Farwell, J., in terms adopted in *British Asbestos Co., Ltd.* v. *Boyd* (2), and he applied it to the case in which the defendants to the action were directors themselves who were relying upon, acting upon, and claiming the benefit of s. 99, or the equivalent section under the Companies Act, 1862.

It has been argued by counsel for the plaintiffs with great force that s. 99 of the Act of 1845 is a clause which ought not to be one upon which persons who were aware of the facts, although not aware of the legal conclusions from the facts, ought to be allowed to rely, because they must be taken to know the law, and it would be wrong that they should take the benefit of s. 99. I am quite unable to accept that view. It seems to me that it is really a question which may be put very shortly: Aye or No were the parties in this transaction acting in good faith? If so, s. 99 ought to be available for all purposes, including the directors themselves. If there is a lack of good faith, then, of course, the court would not allow persons who are parties to the want of good faith, if I may use such a phrase, to take the benefit of it.

Our attention has been called to a decision of Kekewich, J., in *Re Staffordshire Gas and Coke Co., Ltd., Ex parte Nicholson* (3), in which he took the view that the section applied only where the parties had no notice of the actual defect in point of fact. Sargant, J., passed that case by with the remark that it was before the decision of this court in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1), and, of course, before the decision of Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2). I cannot but conclude that if the decision of the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) had been before Kekewich, J., he would have taken a different view. So far as I am aware, the observations of the learned judge in *Re Staffordshire Gas and Coke Co.,*

Ltd., Ex parte Nicholson (3) have never been followed, and I feel bound to say that I think those observations are wrong. If there is good faith—and I emphasise that requirement—the mere fact that the person claiming the benefit of the section had notice of the existence of the facts which led to the disability is not sufficient to disentitle a person to rely upon it if he can honestly say: "I was not aware of the defect and the consequences of the facts I knew; I was not aware of the disqualification which now exists." That, I think, is really the point of the case. LINDLEY, L.J., in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) points out very forcibly that some provision of this kind which applies by common sense should apply to companies of this kind. The language of the section enables us to give it the wide operation this court and FARWELL, J., have attributed to it, and I should be sorry indeed that we should be tempted by the able argument that we have heard to narrow the construction of that section—to narrow its highly beneficial and proper application in the manner that we have been asked to. I think that SARGANT, J.'s judgment in this case was perfectly right, and in my opinion, therefore, the appeal should be dismissed with costs.

SWINFEN EADY, L.J.—I agree. In this case the defendant company, according to its constitution, had fixed the quorum of directors at two, seeing that the number of directors had been limited to three. For the time being there would be three directors, of whom two were to be a quorum, and the constitution further provided that the qualification of directors should be £250—that is to say, holding twenty-five shares of £10 each. There were for a time three directors, Sir W. Pearson (afterwards Lord Cowdray), Sir J. Jackson and Sir W. H. Crundall. Lord Cowdray and Sir W. H. Crundall transferred their shares, and thereupon ceased to be directors, so that Sir J. Jackson was the sole director. There is an affidavit showing that he was proposing to go abroad. At all events, being the sole director, he proposed to appoint two additional directors, and on July 29 there was a board meeting at which he was present and took the chair. Then there was a minute to the effect that Sir J. Jackson as the sole remaining director appointed A. Jackson and J. Proffitt as directors in place of Lord Cowdray and Sir W. H. Crundall. Then it follows on immediately that A. Jackson and J. Proffitt accepted the office of directors, and A. Jackson applied for an allotment of twenty-five shares of the company, and J. Proffitt for an allotment of twenty-four shares of the company, the latter making, with the one share already held by J. Proffitt, his qualification of twenty-five shares. And the above shares were allotted to them respectively in accordance with their applications.

The first question which arises is whether Sir J. Jackson, as the sole remaining director, had power to appoint additional directors. In other words, whether he had power to fill up these casual vacancies that occurred. The argument was that as there was less than a quorum of the board Sir J. Jackson could not do so at all. It required at least two, and there was only one remaining director. In my opinion that is covered by s. 89 of the Companies Clauses Consolidation Act, 1845, especially when read in connection with the interpretation clause. The interpretation clause, s. 3, says that in the Act the following words shall have the several meanings assigned to them unless there be something in the subject or the context repugnant to such construction and then: "Words importing the plural number only shall include the singular number." Then s. 89 provides as follows: [HIS LORDSHIP read s. 89 and continued:] I think that the context requires the remaining directors to include the case of a remaining director. It is obvious that the number of the board may, by death or resignation or otherwise, be so reduced that it may be below the quorum, as well as that there may be vacancies occurring in the board while still leaving a quorum. But in either case it is necessary or proper that the vacancy should be filled up. In my opinion the necessity of the case requires that "the remaining directors" should be read as including the case of a remaining director, so that if and so long as there is any remaining director he

may proceed to fill up the board by appointing persons in the place of the casual vacancies that occur.

For these reasons I am of opinion that it was open to Sir J. Jackson as the sole remaining director, under s. 89, to appoint duly qualified persons to be directors in the place of the two who had ceased to be members of the board.

Then a slip was made. The appointed persons were not at the moment of the appointment qualified. They applied for and obtained their qualification, or thought they obtained their qualification, at the same meeting. It is manifest, it is not disputed, that a slip was made, and that in order for them to be validly appointed directors they must have had a qualification at the date of appointment, but nevertheless, acting in good faith, they accepted the shares, and they acted and continued to act as directors. The question is whether their acts as de facto directors, the acts of the three de facto directors, are protected by s. 99 of the Companies Clauses Consolidation Act, 1845, whereby it is enacted that: [His Lordship read s. 99 and continued:] It has been said that in substance the law is stated in this very short passage in Buckley, L.J.'s book on the Companies Acts, where he sums it up in these words:

> "Endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the company and persons having no notice to the contrary, directors de facto are as good as directors de jure."

That is the note to s. 74 of the Companies (Consolidation) Act, 1908. But it is equally applicable to s. 99 of the Companies Clauses Act, 1845, which applies to companies governed by that Act. It is now settled that this section protects acts both with regard to insiders and outsiders. And having regard to the law as laid down by the Court of Appeal in *Dawson* v. *African Consolidated Land and Trading Co., Ltd.* (1) and to the view subsequently taken by Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2)—with which I must say I entirely concur—I think that it is a beneficial construction to put upon the section.

Common sense really requires that there shall be some provision giving legal effect to the acts in respect of which there is a technical informality because some slip has been made, where the acts have been done in good faith and where the slip has occurred because the parties have not had present to their minds the legal difficulties in the way of doing what they honestly think they are entitled to do. In most of the cases that arise I think that the directors or persons living know the facts of the case and of course are presumed to know the articles of the company. But it is not present to their minds that they are not doing the matter in a properly formal way. In the case in question it does not appear to have been present to the minds of the two new directors that it was necessary for them to have had their qualification shares at the moment of their appointment and did not validate their appointment if they acquired them a moment afterwards. Of course these matters are done at one and the same board meeting. I think that the judgment of Farwell, J., in *British Asbestos Co., Ltd.* v. *Boyd* (2) is not only good law, but very good sound common sense, and I entirely concur in it, and in the judgment already pronounced by the Master of the Rolls.

PICKFORD, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Birkbeck, Yeo & Co.*; *Batten, Proffitt & Scott.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re SCOTT. SCOTT *v.* SCOTT

[Court of Appeal (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Joyce, J.), February 10, 11, 1915]

[Reported [1915] 1 Ch. 592; 84 L.J.Ch. 366; 112 L.T. 1057; 31 T.L.R. 227]

Will—Legacy—"Free of legacy duty"—Chattels in France—Mutation duty and penalties payable under French law—Responsibility for payment.

A testator by his will left to S. "free of legacy duty" pictures and works of art which were at the time of his death in Paris. By the law of France a mutation duty was payable on the legacies. There had been a delay in paying the mutation duty by reason of litigation in the English courts, and, in addition to the mutation duty, certain penalties were payable under French law.

Held: (i) "free of legacy duty" was used in the proper legal grammatical English sense and did not include the mutation duty payable under French law which was payable by the legatee; (ii) the penalties were in substance an extra mutation duty and the person who had to pay the mutation duty had also to pay the penalties; (ii) the executors were under no duty to go to the foreign country to procure the bequests and pay what was necessary to procure them.

Per Lord Cozens-Hardy, M.R.: There may be such conduct on the part of an executor in wilfully and improperly delaying the assent to a legacy that the specific legatee would be entitled to claim compensation or damages for what would be a breach of trust.

Per Phillimore, L.J.: Where a legatee has been left a specific bequest such as a picture "it may be very well held that the testator intends, when he gives a bequest of that kind, that it should reach the hands of the specific legatee, if it is only a reasonable matter of packing and transfer, without expense, but beyond that I decline to go."

Notes. Considered: *Havelock v. Grant* (1946), 27 Tax Cas. 363. Referred to: *Re Grosvenor, Grosvenor* v. *Grosvenor*, [1916] 2 Ch. 375; *Re Rooke, Jeans* v. *Gatehouse*, [1933] All E.R.Rep. 978; *Re Norbury, Norbury* v. *Fahland*, [1939] 2 All E.R. 625; *Re Frazer, Frazer* v. *Hughes*, [1941] 2 All E.R. 155; *Re Quirk, Public Trustee* v. *Quirk*, [1941] Ch. 46; *Re Cunliffe-Owen, Mountain* v. *Comber*, [1951] 2 All E.R. 220.

As to the payment of foreign duties, see 16 Halsbury's Laws (3rd Edn.) 356; and for cases see 21 Digest 130.

Cases referred to:

(1) *Re De Sommery, Coelenbier* v. *De Sommery*, [1912] 2 Ch. 622; 82 L.J.Ch. 17; 107 L.T. 253, 823; 57 Sol. Jo. 78; 21 Digest 130, *958*.

(2) *Perry* v. *Meddowcroft* (1841), 4 Beav. 197; 49 E.R. 314; 23 Digest (Repl.) 322, *3901*.

Also referred to in argument:

Re Brewster, Butler v. *Southam*, [1908] 2 Ch. 365; 77 L.J.Ch. 605; 99 L.T. 517; 21 Digest 130, *957*.

Re Johnson, Cockerell v. *Earl of Essex* (1884), 26 Ch. 538; 53 L.J.Ch. 645; 52 L.T. 44; 32 W.R. 634; 21 Digest 78, *535*.

Farrer v. *St. Catherine's College, Cambridge* (1873), L.R. 16 Eq. 19; 42 L.J.Ch. 809; 28 L.T. 800; 21 W.R. 643; 21 Digest 79, *543*.

Cockerell v. *Barber* (1810), 16 Ves. 461; 33 E.R. 1059, L.C.; 35 Digest 172, *33*.

Peter v. *Stirling* (1878), 10 Ch.D. 279; 27 W.R. 469; 21 Digest 64, 419.

Field v. *Peckett* (*No. 3*) (1861), 29 Beav. 576; 9 W.R. 525; 54 E.R. 751; 24 Digest (Repl.) 742, *7283*.

Re Pearce, Crutchley v. *Wells*, [1909] 1 Ch. 819; 78 L.J.Ch. 484; 100 L.T. 699; 25 T.L.R. 497; 53 Sol. Jo. 419; 23 Digest (Repl.) 482, *5500*.

Appeal by a legatee from two decisions of Warrington, J., [1914] 1 Ch. 847, and [1915] 1 Ch. at p. 597.

Younger, K.C., Maugham, K.C., and *Dighton Pollock* for the legatee.

Sir Robert Finlay, K.C., A. Jenkins, K.C., and *R. F. MacSwinney* for the trustees and executors.

Peterson, K.C., A. J. Spencer (for *F. H. L. Errington* serving with H.M. forces) for the residuary legatees.

C. Gurdon for other interested parties.

LORD COZENS-HARDY, M.R.—These are appeals from two decisions of Warrington, J., upon the construction and the effect of a bequest of certain specific legacies of great value given by the testator, Sir John Murray Scott, to the present appellant.

The questions arise thus: The will gives various pictures and works of art which were at the time of his will apparently, and certainly at the time of his death, locally situated in Paris. He was a domiciled Englishman, and his will is in the English language. It uses phrases which are perfectly familiar to us in England. The first question is whether, under the clauses, which I shall shortly have to read, the gift of these very valuable chattels in Paris, which are specifically given "free of legacy duty," means not merely free of English legacy duty, to which confessedly they are subject, but whether it means, in addition to that, free of the mutation duty payable according to French law upon chattels which are found at the testator's death in Paris, or elsewhere in France. The will, so far as this question is concerned, is very short. The testator gives to Lady Sackville—then Victoria Sackville-West—

> "for her sole and separate use, and free of legacy duty, all my pictures, engravings, furniture, busts, silver, plate, and works of art of every description, wheresoever situate, except at 5, Connaught Place and 8, Chandos Street, London, or wherever may be situate my London house, or except those bequeathed specifically by this my will or any codicil thereto, and further the sum of £150,000."

What do the words "free of legacy duty" mean? I am not in doubt as to the meaning of those words in this will. They are words which are familiar to every English lawyer. They are words which have been found in many statutes of recent years, and although in the very early statutes the phrase was "duty payable in respect of legacies," how it is possible to say that there is any great distinction between that and "legacy duty" passes my understanding. I think, therefore, unless there is something which enables us to find that the testator has used those words "free of legacy duty" in any other than their proper legal grammatical English sense, we are bound to say that they must have that sense. I cannot see, looking at it carefully, anything in the will which lends any colour to a different interpretation of the will. We have been asked to say, when there is a gift to the National Gallery of some valuable pictures: "True, they were taken under a clause of this will free from legacy duty, but can it have been intended that the testator should have made a gift of these very valuable pictures to the National Gallery, leaving the trustees of the National Gallery to pay the mutation duty on them according to French law?" It does not shock me at all. It seems to me if they were simply given with the words "free of legacy duty," of course, the National Gallery trustees would have to pay the French mutation duty. But to say that the effect of that gift is to put an unnatural meaning on the words used—namely, "free of legacy duty," is what I cannot adopt. Then it has been pointed out, and I think it is worth mentioning, that in the last codicil—the testator made five codicils, I think—he says:

"And in case I shall in my lifetime have made any disposition purporting to operate as immediate gifts inter vivos and by reason of the Finance Act, 1910, or any statutory modification thereof, any death duties shall become payable on my death in respect thereof, then I hereby direct that such duties shall be payable by my executors out of my general personal estate."

He was aware of the distinction according to English law between legacy duty and any other death duties. It shows his acquaintance with English law. And as it has been decided before, and I think quite properly, that a gift free of legacy duty would not apply to succession duty or to estate duty, it is an a fortiori case to say that it cannot apply as a matter of construction to the mutation duty which is payable under French law. Upon that, therefore, which is the main point of the appeal, I entirely concur with the judgment of WARRINGTON, J.

But then we have heard an interesting and elaborate argument on a second point. It is said that it is the duty of an executor, where there is a specific bequest of property which is in a foreign country, to go to that foreign country and to procure the specific article, to pay what is necessary in order to get it, and to bring it back to this country. Each one of us has asked, I think, for a statement by any text writer to support that proposition. I can find none, and it is conceded there is none. Is there anything in principle which can justify it? I think not, for many reasons, but the one that strikes me most is this. When there is a specific legacy of chattels, the first duty of the executor is to consider whether he assents to it or not. If he assents to it, the property passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them, and to do what is necessary, and everything of that kind. Of course, in saying this, I do not mean to assert, or even to imply, that there may not be such conduct on the part of an executor in wilfully and improperly delaying the assent to a legacy as may entitle the specific legatee to claim compensation or damages, pecuniary relief against him, for what would be a breach of trust. But we start in the present case with this finding of the learned judge in the court below, that the executors in this case have acted with perfect propriety, and have carried out their duties according to English law, acting as they have under the direction of the court, a receiver being in possession during a large part of the time. Under those circumstances, there being no authority to support the proposition, I am clearly of opinion that we ought not to hold that it was the duty of the executors towards the present appellant to go to Paris, to pay this mutation duty in order to get possession of the property, and deliver it to the legatee. I may say further, as at present advised I do not see how they could have got the property even if they had gone to Paris, because the French law does not recognise executors as such at all. It only recognises either the specific legatee according to the one view, or the residuary legatee according to the other. That being so, without going into the authorities which have been cited to us, beyond mentioning the recent decision of PARKER, J., in *Re De Sommery, Coelenbier* v. *De Sommery* (1), I think that we must hesitate to regard *Perry* v. *Meddowcroft* (2) (4 Beav. at p. 204) as an authority to which great (if any) weight ought to be attached, I agree entirely with the comments of PARKER, J. ([1912] 2 Ch. at p. 628) upon that case. And I think that in the decision which we are now giving we are not in any way interfering with anything that has been said on this point by any judge to whose judgments our attention has been called.

The third point is this. It is said that even if the legatee is to pay the mutation duty payable in respect of the legacy, there are penalties imposed by French law for delaying the payment of duties for a certain time after the testator's death. There was, of course, a great deal of delay in the present case, because there was very heavy and important litigation as to the validity of the will, and it was only after proceedings were taken in the Probate Division that the will was established. Of course, during that period nothing could be done, and during

that period no doubt the penalties were running. But the fair meaning of the penalty clause is, I think, that which is plainly put by Warrington, J., in his judgment on this point ([1915] 1 Ch. at p. 597). These penalties are really in substance an extra mutation duty standing exactly on the same footing as the other, and the person who has to pay the mutation duty has, in the events which have happened, also to pay the penalties. If there was any other person liable to pay these extra duties who had neglected to do so, then the present appellant, when she comes to pay that which has to be paid, might be entitled to claim an indemnity from the other person. But once it is conceded that the executors have only done that which was their obligation, I fail to see how it can be held that there is any obligation upon any person whatever, except upon the present appellant, to pay these duties. It is put by Warrington, J., thus (ibid. at p. 599):

> "It is quite true that she was not placed in possession of her legacy, but the reason for that was a proper reason; she has not been in any way wrongly kept out of her legacy, the executors have committed no wrong against her, and nothing, therefore, seems to me to give rise to any claim for an indemnity. It seems to me that this penalty is as much the mutation duty as the original mutation duty to which my decision of February of this year applied, and that the legatee has no right to recover the penalty any more than she has the right to recover the mutation duty."

For these reasons I think that the two judgments of Warrington, J., were right in all the points, and that these appeals should be dismissed with costs.

PHILLIMORE, L.J.—I am of the same opinion. As regards the first point, after what has been said by Warrington, J., in the court below, and by the Master of the Rolls to-day, I can absolve myself from doing anything more than putting my judgment in a very short compass. The testator has used words of art, and it may be from the other parts of the will you may deduce the view that he has used words of art inartificially, unless you say that you must treat those words of art as meaning what they technically do mean. The words "legacy duty," to my mind, are words of art, and mean duty payable under English or British law. If there was nothing in the way of any duty on the succession but the mutation duty, one might then be driven to suppose that the testator had used a term of art in an inartificial sense. But inasmuch as there is ample to satisfy the words "free of legacy duty," there is no reason for our supposing that they mean more than what they say. What the testator intended, or what he would have done if he had had the point present to his mind, I cannot guess. I may have my suspicions or my conjectures, but it is not for me to guess, and it is safer to rest upon general law in these matters.

The second point is a different one, and would arise if the words "free of legacy duty" had never been used in this way. It rests upon the contention that it is the duty of executors either to deliver a specific legacy to the legateee at his domicil, or at least to bring it home to the testator's domicil and let the legatee have it. There really is, it is strange, no authority on the subject, except to a certain extent, the language of Warrington, J., which is up to a point against his own conclusion. Apart from that there is apparently no authority on the subject. There are a number of cases which say that where a chattel is bequeathed, and that chattel is at the testator's death subject to some lien or pledge, at any rate, one that he has created himself, according to Sir George Jessel, possibly whether he has created it himself or not, as a matter of construction the testator is supposed to have given the chattel free of all lien or pledge. At any rate, to this extent it is the duty of the executors either to redeem the pledge or to give the value of the chattel. That is not the point. Apart from that, there is only this language of Warrington, J., that it is the duty of the executor to deliver it. The argument on behalf of Lady Sackville is that this being a specific legacy, the duty of the executors is to deliver the subject to the legatee, and that any expenses which they may incur in order to do that are charges and expenses incurred by

them in their capacity as executors, and therefore payable out of the general estate of the testator. Stated in that broad way, I think that the contention on the part of the specific legatee is correct. But then the learned judge goes on to show why it does not apply. I have been thinking over that matter and I should be sorry if anything was said here which would make executors chargeable who in an ordinary case went to the expense of packing up a picture or some valuable chattel, and sent it to the home of the legatee in some other part of England, or even some near part of the Continent. One knows that in practice executors are always expected to do that sort of thing, and the residuary legatee who is usually left a picture or some token of that kind, does not expect to have to pay the cost of packing and sending it. In that sort of way it may be very well held that the testator intends, when he gives a bequest of that kind, that it should reach the hands of the specific legatee, if it is only a reasonable matter of packing and transfer, without expense, but beyond that I decline to go. I know of no authority to say that executors are bound to bring a chattel to the testator's domicil, or to bring it from foreign parts in order to deliver it to the legatee, either after having been passed through the testator's domicil or otherwise. If the argument is worth anything, it would mean that wherever chattels are locally situated in some foreign country, and there is no duty of any sort payable on those chattels by reason of the death of the testator, it falls to the executors to redeem them—to ransom them, as it were, from the foreign country—and bring them away and deliver them safely to the legatee. By this time of day, if there was any such obligation, there would have been authority for it, and I decline to hold that there is any such obligation.

With regard to the last matter, I confess that I have a great deal of sympathy with Lady Sackville. I think that it is extremely hard upon her that, in the events which have happened, she would have to pay these penalties, and I have been struggling to see if I can find any ground upon which I could relieve her. But it is not merely a question of relieving Lady Sackville. It involves putting a burden on the residuary legatees, and I cannot find any misconduct either on the part of the residuary legatees or of the executors. At least, I am relieved from inquiring whether there is anything that can be complained of on the part of the executor, by the express admission of Lady Sackville's counsel. In truth, the delay may be divided into two periods: The first is the period for which the executors are naturally not responsible. It is the period during which somebody who contested the will left the whole matter in doubt, and made it necessary to have a receiver, and made it impossible to deliver any of these chattels to the legatees. The second period is a period which I have more doubt about. But counsel for Lady Sackville has said that the executors, in the peculiar circumstances of the case, were entitled to take the opinion of the court before they parted, at any rate, with a great portion of these chattels, because it was very doubtful whether they passed under the will or not. That being so, it is Lady Sackville's misfortune that the testator did not express himself more clearly, and the chattels have had to remain all this time in medio, and therefore, in the events which have happened, it was not possible to free them from the mutation duty or from the penalties which are accessory to that duty.

Before I conclude, that observation leads me to add another. Whatever might be said of a case where the English law applied, and where the assent of the executors is necessary to the obtaining by the specific legatee of his legacy, in a country like France, where the legatee, and the legatee only, is the person who can recover the legacy, it seems to me ridiculous to put upon executors the duty of getting the legacy and bringing it home. Lex neminem cogit ad impossibilia. For these reasons, I agree that these two appeals fail.

JOYCE, J.—In this case, in my opinion, it must be taken that the testator said what he meant, and that he meant simply what he said. In an English will the natural meaning of the term "legacy duty" is a definite well-known thing—

namely, the duty imposed upon legacies by the Legacy Duty Act, 1796—I think there was one earlier—and subsequent Acts relating to the same subject. That is what the term "legacy duty" means, and, in my opinion, it means nothing else. No doubt there might be a case—one can conceive such a case—in which the term "legacy duty" has been used with regard to a subject which is not liable to legacy duty. And I can conceive that it might be held that in certain special circumstances, not that the term "legacy duty" meant "estate duty" or "settlement duty," or some other duty, but that the testator, when he used those words, meant something else, because he must have done so. In the present case, all the bequests are liable to "legacy duty" properly so-called. If the testator, or the draughtsman of his will, when that will was drawn knew about the mutation duty, and when I say "knew," I mean had it in his mind, and intended that also to be paid out of the general estate of the testator it is incredible to my mind that he should not have used language very different from that which he has in fact used. If, on the other hand, he did not have this question of the mutation duty in his mind and so had no definite formed intention on the subject of the manner in which it should be paid, how can we give any other than the natural meaning to the term "legacy duty" from some conjectural notion as to what the testator would probably have done if his attention had been called to the subject of the existence of the mutation duty?

So much for the question of construction. Then, with regard to the second question, no doubt as to a specific bequest of chattels that are in pledge at the time of the testator's death, that pledge must be redeemed out of the testator's estate. But, in my opinion, that rule does not apply to making the residuary legatees liable to pay something which is imposed upon the specific legatee upon or after the death of the testator. There is one other point with reference to the penalties. All I can say is that I agree entirely with what WARRINGTON, J., has said, so that I agree that both these appeals fail.

Appeals dismissed.

Solicitors: *Meynell & Pemberton; Capron & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

STRATFORD-UPON-AVON CORPORATION *v.* PARKER

[KING'S BENCH DIVISION (Lush and Atkin, JJ.), March 4, 5, 1914]

[Reported [1914] 2 K.B. 562; 83 L.J.K.B. 1309; 110 L.T. 1004; 58 Sol. Jo. 473]

Landlord and Tenant—Repair—Breach of covenant—Executor de son tort—Personal liability on covenant.

An executor de son tort does not by the mere fact of intermeddling with a term which was vested in the deceased become liable by privity of estate on the repairing covenants contained in the lease.

Williams v. *Heales* (1) (1874), L.R. 9, C.P. 177, distinguished.

Notes. Referred to: *A.-G.* v. *Parsons*, [1955] 2 All E.R. 466.

As to the rights of an executor de son tort, see 16 HALSBURY'S LAWS (3rd Edn.) 147, 148; and for cases see 23 DIGEST (Repl.) 71.

Case referred to:

(1) *Williams* v. *Heales* (1874), L.R. 9 C.P. 177; 43 L.J.C.P. 80; 30 L.T. 20; 22 W.R. 317; 23 Digest (Repl.) 68, *600.*

Also referred to in argument:

Tremeere v. *Morison* (1834), 1 Bing. N.C. 89; 4 Moo. & S. 603; 3 L.J.C.P. 260; 131 E.R. 1051; 24 Digest (Repl.) 696, *6812*.

Sleap v. *Newman* (1862), 12 C.B.N.S. 116; 6 L.T. 386; 142 E.R. 1087; 24 Digest (Repl.) 697, *6816*.

Rendall v. *Andreae* (1892), 61 L.J.Q.B. 630; 8 T.L.R. 615; 24 Digest (Repl.) 695, *6805*.

Padget v. *Priest* (1787), 2 Term. Rep. 97; 100 E.R. 53; 23 Digest (Repl.) 66, *580*.

Appeal by the plaintiffs, lessors, from the decision of His Honour Judge Ingham sitting at the Stratford-upon-Avon County Court.

The facts are set out in the judgment of Lush, J.

J. B. Matthews, *K.C.*, *W. H. Riley-Pearson*, and *G. F. Spear* for the plaintiffs.

Disturnal, *K.C.*, and *J. Wylie* for the defendant.

LUSH, J.—This is an appeal by the plaintiffs from the judgment of the learned judge of the Stratford-upon-Avon County Court, and it raises a point of some novelty and of some little difficulty. The plaintiffs were the lessors of some premises of which the mother of the defendant was the assignee. She died some few years ago, and this action was brought against her son as executor de son tort and assignee of his mother upon a covenant to repair contained in the lease. The evidence given in the court below consisted first of all, to some extent, of answers by the defendant to interrogatories administered by the plaintiffs, and secondly of some correspondence, and the facts, so far as the answers to interrogatories were concerned, were shortly these: No letters of administration were ever granted in respect of the estate of the defendant's mother, and she left no will. On the mother's death the rents of the demised premises received from the tenants were collected by the defendant, who had collected them during his mother's lifetime, and were paid by him to his sister, who died in August, 1912. After his sister's death the defendant did not know to whom the property belonged, so what he did was to continue to collect the rents and pay the ground rents to the plaintiffs, retaining the surplus in his own hands on behalf of such persons as might in law be found entitled to the rents. The last answer to the interrogatories, which was also put in, stated that the defendant had never been in possession of the demised premises. What appeared from the correspondence was this: The defendant had paid the ground rent after his mother's death in her name and on her behalf. The plaintiffs were not aware of the death of the defendant's mother until a letter was written by the solicitor for the defendant on Dec. 20, 1912. That letter was written in answer to a letter from the plaintiffs' representative dated Dec. 19, 1912, addressed to the defendant's mother, they thinking she was still alive, which gave her notice that certain work was required to be done by her in accordance with the covenants in her lease, and asking her to inform the plaintiffs who was to do the work and when it would be commenced. In answer the defendant's solicitor wrote the letter of Dec. 20, telling the borough surveyor, who had written on behalf of the plaintiffs, that the defendant's mother had died two years before without leaving any estate, and that since her death the defendant had collected the rents and paid them over to his sister, the letter adding that the defendant did not admit any liability. In answer to that, some six weeks afterwards the town clerk wrote to the defendant's solicitor asking whether the defendant was his mother's executor, and, if not, who her legal personal representatives were, and the letter went on to say that it was quite clear that the estate was liable, and that if the defendant was not one of the executors he had intermeddled in the estate and was liable at least for the amount he had received. The letter continued:

> "Please send me an authority to all the tenants to pay the rents in future to us, so that we may be certain of some compensation for the very bad state the houses have been allowed to fall into."

On Feb. 27, 1913, the defendant's solicitor wrote in reply

"He (the defendant) tells me that as there was no estate his mother left no will, neither has he taken out letters of administration, and for this reason I do not see that he could give you any legal authority for the tenants to pay their rents to you. At the same time, so far as he is concerned, he has no objection to your taking possession of the houses and, if it will assist you, you could use this letter for that purpose."

On that same day, or within a day or two after the receipt of that letter, the plaintiffs acted on the suggestion contained in it, and took possession of the premises, and from that time received the rents. On these facts the question is whether this action for breach of the covenant to repair contained in the lease lies against the defendant who is sued as I have said as executor de son tort and assignee of the term. The learned judge held that the action would not lie, and gave judgment for the defendant. The short note of his judgment is as follows:

"In this case I find, as a fact, that defendant acted as agent first for his mother and then for his sister, and since the latter's death plaintiffs (having regard to the facts stated in defendant's answers to interrogatories which they have put in) have not proved that defendant has ever taken possession of the term as his own, or acted or intended to act for himself."

It is quite obvious that the defendant cannot be sued on this covenant, unless he either entered into the covenant or else became liable as covenantor by privity of estate. Of course it may be that, although he did not in fact enter into the covenant or become liable by privity of estate on the covenant, he or any other person may be estopped from denying that he is liable, but estoppel is only a rule of evidence, and if he is estopped from denying the facts he would be, on the facts which must be assumed if not proved against him, in the same position as if he had entered into the covenant. Therefore it is quite right as a proposition to say as I have said that the defendant can only be successfully sued on the covenant if he entered into it, or if he cannot dispute that he did so, or if by privity of estate he became liable upon the covenant because it ran with the land and the estate was vested in him. It is manifest that the defendant did not enter into the covenant. Can he be sued on it by privity of estate? In other words was the term vested in him so that he became liable by privity of estate on the covenants, or is he estopped from disputing these facts? It will be convenient to deal with the latter alternative first, because it was practically admitted by the plaintiffs that there was no estoppel. If it were not admitted it is perfectly plain upon the correspondence that there was none. The defendant never paid the ground rents in his own name; he never did anything in the nature of attorning to the plaintiffs or asserting that he was their tenant. He never even did it by implication, because when he paid the ground rent he did not do it upon the footing that he was the tenant, and so far as the plaintiffs were concerned they never received any ground rent on the footing that the defendant was their tenant. They took it upon the footing that it came from their real tenant, the defendant's mother, and as soon as they ascertained that the mother was dead they acted upon the suggestion made by the defendant and took possession of the premises at once, and if election was necessary upon their part, they elected not to treat the defendant as if he had been their tenant. There could be no estoppel, because the plaintiffs did not alter their position by reason of anything the defendant said or did. Therefore we fall back upon a proposition which may be simply stated thus: Is an executor de son tort, who has done what the defendant did in this case, a person who is liable by privity of estate on the covenants contained in the term vested in the intestate? It seems to me that when one considers the circumstances of the case and the authorities, and when one also considers the true position of an executor de son tort, that he is not liable in circumstances such as these by privity of estate. A lawful executor is,

of course, in an entirely different position. If a testator dies possessed of a term of years the term vests in the executor, but the executor cannot then be personally sued upon the covenants contained in the lease, although in law the term is vested in him by assignment by operation of law, but if he enters and takes possession and enjoys the beneficial occupation, then that entry, coupled with the legal title he has as executor, puts him in the position of an actual assignee of the term, liable upon the covenants by privity of estate as fully as if the term had been assigned to him.

That is the position of a lawful executor, but an executor de son tort has no title to the term by operation of law or otherwise. An executor de son tort, if he intermeddles, becomes subject to the liabilities of an executor, but he has none of the privileges of a legal executor, and does not by operation of law or otherwise become entitled to the term of years vested in a person who has never assigned it to him. It is plain in the present case that this term was never assigned to the defendant. Therefore, if an executor de son tort does enter and receive the rents and intermeddle with the estate, he has not that which the lawful executor has which makes that entry, coupled with his title, equivalent to an assignment of the term. He does nothing but enter and intermeddle, and therefore it seems to me that the defendant in the present case was never possessed of this term, and if he was never possessed of it he never had that privity of estate which would have fastened upon him the same liabilities in respect of this covenant which he would have been under if he had actually entered. I think *Williams* v. *Heales* (1), which was cited as an authority in favour of the plaintiffs, is in reality an authority in support of the defendant's contention. There the facts were very similar to those in the present case. The defendant had undoubtedly intermeddled with an estate, namely a term of years. He had received the rents and paid the ground rent in his own name to the plaintiffs, the lessors of the premises, and the question was whether the plaintiffs were entitled to sue him and treat him as being in the position of covenantor on a covenant to repair. I think the defendant was held by a majority of the court to be an executor de son tort, although the head note says simply:

> "Semble, that the defendant was executor de son tort of the term, but held, beyond all doubt, he had estopped himself from denying that he was assignee."

I agree that, while holding him to be an executor de son tort, his liability is put on the ground of estoppel. The real basis of the decision was that the defendant had so conducted himself between himself and the lessors by paying the rent and otherwise asserting his title to the term that he was estopped from disputing that he was in the position of an assignee. That ground of decision would have been wholly unnecessary if the plaintiffs' contention were right in this case, and it is a ground which is wholly without foundation in the present case, because here there was no estoppel. In my opinion that case goes a long way to support the proposition for which counsel for the defendant contended. The present action was framed in the alternative against the defendant in his capacity as executor de son tort, or as being personally liable on the covenant. There were no assets and the action proceeded on the basis that the defendant was liable upon the covenant. In my opinion the learned judge was quite right in holding that the defendant was not so liable. I think there was in this case no privity of estate, and as there was admittedly no privity of contract the action was rightly dismissed.

ATKIN, J.—I agree. In this case an action was brought against the defendant on double or alternative grounds. It was said firstly that the defendant was liable on the covenants in the lease as executor de son tort of his mother who was for a number of years the assignee of a term. That would not be a personal liability on the part of the defendant, but a liability confined to such assets of the defendant's mother as came into his hands as executor de son tort. The second claim made against the defendant was made against him personally. As

to the first claim made, I think it has been made plain in these proceedings that that ground of claim was not relied upon by the plaintiffs, and therefore, I will say nothing more about it. It would depend upon two things, first, that the defendant was executor de son tort, and, secondly, that he had assets. For good reasons, doubtless, that is not the ground of claim which has been insisted upon by the plaintiffs. As to the second ground of claim, it is said that the defendant is liable because, being an executor de son tort, he entered, and therefore became personally liable upon the repairing covenants. I think it is plain that, so far as an executor is concerned, he is liable for breaches of covenants committed after the death of the testator, provided that he has entered. He would be liable in the ordinary course by reason of privity of estate as assignee of the term under the will when he has taken out probate. But the law has held that that is not sufficient, and that, although he is an assignee by operation of law, the law will not hold him personally liable on the covenants unless, in addition, he has entered. What renders him liable is not entry alone, but the fact that he is assignee of the term at law, coupled with the additional fact of entry. The case of an executor de son tort is said by the plaintiffs to be exactly the same—that as executor de son tort he must be deemed an executor, and if he enters he becomes personally liable. It appears to me that this is a fallacy, because in the case of an executor de son tort there is no term vested in him. He is not an assignee at law, and all that has happened to him is that he has intermeddled with an asset of the estate—namely, the term. That may make him an executor de son tort, but it does not vest the term in him or create a liability by privity of estate. Therefore an essential feature necessary to establish his liability as an executor is absent in the case of an executor de son tort. It appears to me that there was evidence in the present case of a sufficient entry by the defendant to make him personally liable if he was in fact an executor and the estate had been vested in him as assignee at law. But as he was not the real executor the possession of the rents by the defendant and the dealing with them by him were not sufficient to make him personally liable. It is, of course, possible for an executor de son tort or any stranger to make himself personally liable by estoppel as against the landlord, and if such acts are done by an executor de son tort as would create an estoppel between him and the landlord then there is no question that he might be made personally liable upon the covenants. In the present case there is no such estoppel, and the liability of the defendant upon that ground was expressly repudiated by the plaintiff's counsel. In these circumstances it appears to me that there is no ground for saying that the defendant is personally liable in respect of these repairing covenants, and for the reasons that I have given this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Crowders, Vizard & Co.*, for *R. Lunn*, Stratford-upon-Avon; *C. E. Whitehouse*, Birmingham.

[*Reported by* PHILIP B. DURNFORD, ESQ., *Barrister-at-Law.*]

LENNARD'S CARRYING CO., LTD. *v.* ASIATIC PETROLEUM CO., LTD.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor), February 26, March 1, 8, 1915]

[Reported [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 31 T.L.R. 294; 59 Sol. Jo. 411; 13 Asp.M.L.C. 81; 20 Com. Cas. 283]

Shipping—Carriage by sea—Cargo—Loss by fire caused by unseaworthiness—"Actual fault or privity" of shipowner—Ship owned by company—Responsibility for acts of director managing ship—Merchant Shipping Act, 1894 (57 & 58 *Vict.*, *c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894, the owner of a British sea-going ship is not liable to make good to any extent whatever "any loss or damage happening without his actual fault or privity" where any goods are lost or damaged by reason of fire on board the ship.

The appellant company was the owner of a certain ship. L. was the active director of the company, his name was registered in the ship's register, and he took the active part in the management of the ship. The ship, which carried cargo belonging to the respondents, was in an unseaworthy state owing to the condition of the boilers, and as a result the ship became stranded in a gale and the cargo was destroyed by fire.

Held: (i) L. was the alter ego of the company and not merely a servant or agent as his was the directing mind and will of the company, and there was a presumption that his action was the action of the company itself within s. 502; (ii) neither L. nor the company had rebutted this presumption and the company had not established that the unseaworthiness arose without its actual fault or privity.

Notes. The Merchant Shipping (Liability of Shipowners and Others) Act, 1958, has amended the Merchant Shipping Act, 1894, in some respects. Part VIII of the 1894 Act is extended to certain persons other than the shipowner (ss. 3 and 8 (4) of the 1958 Act), and to unregistered ships and ships in the course of completion of construction (s. 4 of the 1958 Act). The word "sea-going" in s. 502 (1) of the 1894 Act is repealed (s. 8 (1) of the 1958 Act).

Applied: *Royal Exchange Assurance Corpn. of London* v. *Kingsley Navigation Co.*, [1923] A.C. 235. Considered: *Tempus Shipping Co.* v. *Louis Dreyfus Co.* (1930), 144 L.T. 13. Applied: *H.M.S. Truculent, The Admiralty* v. *The Divina (Owners)*, [1951] 2 All E.R. 968. Considered *The Hans Hoth*, [1953] 1 All E.R. 218; *The Empire Jamaica, Western Steamship Co.* v. *N.V. Koninklijke Rotterdamsche Lloyd*, [1955] 3 All E.R. 60. Referred to: *Ashton* v. *London and North Western Rail. Co.*, [1918] 2 K.B. 488; *The Bristol City*, [1921] P. 444; *La Compañia Martiartu* v. *Royal Exchange Assurance Corpn.*, [1923] 1 K.B. 650; *Rudd* v. *Elder Dempster & Co.*, [1933] 1 K.B. 566; *Knott* v. *L.C.C.*, [1934] 1 K.B. 126; *Wheeler* v. *New Merton Board Mills, Ltd.*, [1933] 2 K.B. 669; *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] All E.R.Rep. 480; *The Napier Star*, [1939] P. 330; *Imperial Smelting Corpn., Ltd.* v. *Joseph Constantine Steamship Line, Ltd., The Kingswood*, [1940] 2 All E.R. 46; *Beauchamp* v. *Turrell*, [1952] 1 All E.R. 719.

As to the liability of the shipowner in cases of fire, see 30 Halsbury's Laws (3rd Edn.) 295; and for cases see 41 Digest 417–419. As to the effect of initial unseaworthiness on the shipowner's liability, see ibid. 408–410; and for cases see 41 Digest 428 et seq.

For the Merchant Shipping Act, 1894, see 23 Halsbury's Statutes (2nd Edn.) 395. For the Merchant Shipping (Liability of Shipowners and others) Act, 1958, see 38 Halsbury's Statutes (2nd Edn.) 1091.

Cases referred to in argument:

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.*, [1912] 1 K.B. 229; 81 L.J.K.B. 129; 105 L.T. 810; 28 T.L.R. 85; 12 Asp.M.L.C. 82; 17 Com. Cas. 6, C.A.; on appeal sub nom. *Norfolk and North American Steam Shipping Co., Ltd.* v. *Virginia Carolina Chemical Co.*, [1913] A.C. 52, H.L.; 41 Digest 418, *2613*.

Ingram and Royle, Ltd. v. *Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 12 Asp.M.L.C. 387; 19 Com. Cas. 105, C.A.; 41 Digest 417, *2609*.

The Fanny (1912), 28 T.L.R. 217; 56 Sol. Jo. 289, C.A.; 41 Digest 919, *8100*.

The Warkworth (1883), 9 P.D. 20; 53 L.J.P. 4; 49 L.T. 715; 32 W.R. 479; 5 Asp.M.L.C. 194; on appeal (1884), 9 P.D. 145, C.A.; 41 Digest 918, *8092*.

Wilson v. *Dickson* (1818), 2 B. & Ald. 2; 106 E.R. 268; 41 Digest 918, *8093*.

Smitton v. *Orient Steam Navigation Co., Ltd.* (1907), 96 L.T. 848; 23 T.L.R. 359; 51 Sol. Jo. 343; 10 Asp.M.L.C. 459; 12 Com. Cas. 270; 8 Digest (Repl.) 131, *848*.

Appeal by the shipowners from a judgment of the Court of Appeal, [1914] 1 K.B. 419, affirming a decision of BRAY, J., in favour of the respondents who were the plaintiffs in this action.

Adair Roche, K.C., Raeburn, and *I. H. Stranger* (for *J. A. H. Wood* serving with His Majesty's Forces) for the appellants.

Maurice Hill, K.C., and *F. D. MacKinnon, K.C.*, for the respondents.

The House took time for consideration.

Mar. 8, 1915. The following opinions were read.

VISCOUNT HALDANE, L.C.—In this case the appellants have, at all events, the satisfaction of knowing that their case has been excellently argued by both the learned counsel who have appeared for them at your Lordships' Bar. The case, which we have now heard fully and as to which we do not think it necessary to trouble the respondents' counsel, is shortly this. The *Edward Dawson* was a tank steamer designed for the carriage of oil in bulk. She was chartered by her owners, the appellants, on a time charter to a company known as the Anglo-Saxon Petroleum Co., and in the course of her employment she proceeded to Novorossisk in the Black Sea. There she loaded in bulk 2,011 tons of benzine, and the bills of lading, six in number, were endorsed by the Anglo-Saxon Petroleum Co. to the Asiatic Petroleum Co., who are the respondents in this case. The benzine has been lost, and the respondents have brought an action against the appellants to recover damages for the loss of their cargo.

The story of the case is in outline this. The *Edward Dawson* was built in 1890, as I have said, for the carriage of oil in bulk, and in 1907 she was bought by the appellants, who spent a good deal of money upon her, and proceeded to use her for certain voyages. In January, 1911, after she had been for a good while at sea, she was overhauled at Birkenhead, and the Bureau Veritas, a well-known agency which issues certificates and keeps a list for the purpose of showing the condition of ships, gave a certificate through Mr. Viehoff, who was their agent at Birkenhead, to the effect that she would have a satisfactory character for another twelve months, but only on condition that her boiler pressure was reduced from 160 lb. to 130 lb. That obviously made a great deal of difference to the energy developing limits of capacity of the ship. Subsequently to that she proceeded on what she has described in the course of the argument as a round voyage. She went to Thames Haven, and at Thames Haven certain repairs were done under the superintendence of a Mr. Clarke to her boilers; she proceeded to New York, and from New York to Barcelona, and after various intermediate voyages she

came to Novorossisk in the Black Sea, where she loaded a cargo of benzine of which I have spoken. She left Novorossisk, and the unsatisfactory condition of her boilers soon became manifest. These boilers leaked; they leaked salt water into the central furnaces, the furnaces became silted up with salt, so that their capacity was diminished, and the result was that when the ship on her way back passed the Straits of Dover and came into the North Sea she was not in a condition to develop such power as was desirable in the event of her encountering heavy head weather. She found herself on Oct. 1 off the Dutch coast near the mouth of the Scheldt. There was a gale blowing, and she hove to and set her head against the gale to prevent herself from being driven on to the lee shore, but she was driven to the leeward and grounded. She first grounded on the Botkill Bank, and after bumping on the bank several times, she got off, but finally grounded in the Scheldt near Flushing. Her port of destination was Rotterdam. She does not appear to have been under adequate control. She had, among other things, burst a tube, which was not unlikely, having regard to wear and tear in excess of the length of life of tubes, which was given in the evidence as only ten years, and to the general condition of her boilers. She burst a tube, she took the ground, she was unable to get off the ground, she bumped, and as the result of bumping the benzine got loose from the tanks, the deck bulged, the tanks were probably cracked, anyhow the benzine began to get into the furnaces, and the result was a conflagration. It was suggested that if the flame had been extinguished by the injection of water, this might have been prevented, but I do not think the evidence upon that point at all satisfactorily established that that could have been secured, or, at any rate, that the operation could have been properly carried out. In that state of things the loss of the cargo took place, and the case came before BRAY, J., who tried it, and BRAY, J., found a number of facts. He found these facts after hearing the evidence on both sides, and I think that his findings of fact were justified. They were these: The first was that the ship when she left Novorossisk was unseaworthy by reason of defects in her boilers. The second finding of fact was that the stranding on the Botkill Bank, just off the mouth of the Scheldt, was caused by the want of steam, which in its turn was caused by the unseaworthy condition of the boilers; and he found the same causes as regards the subsequent stranding in the Scheldt itself. Then in the third place he found that the loss was not caused by any negligence or want of precautions on the part of the engineers, because he does not find it proved that anything they could have done could have altered the consequences. He found that the loss of the cargo was caused by the unseaworthiness of the ship due to the condition of the boiler. Then there are other findings which are findings of mixed fact and law. One of these is that the duty of supervision remained with the managing owners, and that the fault of the managing owners was a fault that affected the company itself.

That last question gives rise to the real question of law which occurs in this case. Taking the facts to be as the learned judge has found them, what is the consequence as regards the liability of the appellants? The appellants are a limited company, and the ship was managed by another limited company, Messrs. John M. Lennard & Sons, and Mr. J. M. Lennard, who seems to be the active director in J. M. Lennard & Sons, was also a director of the appellant company, Lennard's Carrying Co., Ltd. In that state of things, what is the question of law which arises? I think that it is impossible, in the face of the findings of the learned judge, and of the evidence, to contend successfully that Mr. J. M. Lennard has shown that he did not know or can excuse himself for not having known of the defects which manifested themselves in the condition of the ship, amounting to unseaworthiness. Mr. Lennard is the person who is registered in the ship's register and is designated as the person to whom the management of the vessel was intrusted. He appears to have been the active spirit in the joint stock company which managed this ship for the appellants; and under the circumstances the question is whether the company can invoke the protection

of s. 502 of the Merchant Shipping Act to relieve it from liability which the respondents seek to impose on it. That section is in these words:

> "The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases—namely, (1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

Did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. Whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard, therefore, was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of s. 502. It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happened to be the owner of a ship, merely because it happened to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.

It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so. In that state of the law it is obvious to me that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action. But Mr. Lennard did not go into the box to rebut the presumption of liability, and we have no satisfactory evidence as to what the constitution of the company was or as to what Mr. Lennard's position was. The memorandum and articles of association were not put in. The only evidence was that of the secretary, Mr. Simpson, who told the court that he was secretary not only to the company, but also to the managing company, and the inference to be drawn is that the officials of the two companies were very much the same and transacted very much the same business. Under the circumstances I think that the company and Mr. Lennard have not discharged the burden of proof which was upon them, and that it must be taken that the unseaworthiness, which I hold to have been established as existing at the commencement of the voyage from Novorossisk, was an unseaworthiness which did not exist without

the actual fault or privity of his own company. If that is so, then the judgment of the majority of the Court of Appeal and of BRAY, J., was right.

There is another point which I have not entered upon, because it was not touched upon in the court below, and that is the question as to whether the terms of the charterparty are such as to exclude the operation of s. 502 altogether. That question remains intact. It is not necessary to deal with it in this case, and I therefore pass it by. For the reasons which I have given, I move that this appeal be dismissed, and dismissed with costs.

LORD DUNEDIN.—I concur, and I have but little to add to what the noble and learned Lord on the Woolsack has said. It appears clearly from the facts, and indeed was eventually admitted by the appellants' counsel, that the loss which had its final outcome in the fire was really due to a set of defects in the steam power in the boilers which constituted unseaworthiness. In the court below at the trial the principal controversy seems to have turned upon whether the fault in allowing the vessel to be unseaworthy was a fault committed by the captain at Novorossisk or was the fault of J. M. Lennard, the registered manager of the ship. I agree with what my noble and learned friend has said that the true view of the facts is that the fault was the fault of Lennard. But before your Lordships' House the chief argument has been, admitting that it was the fault of J. M. Lennard, whether that was actual fault or privity in the sense of s. 502 of the Merchant Shipping Act. The real question, therefore, turns upon what is to be the application of the words there used to a metaphysical conception like an incorporated company who cannot act directly themselves. I do not know that a case will ever arise in which that will need to be treated as a purely abstract proposition. I do not think it arises in this case, and I certainly incline to the opinion that it will be found always to depend upon the particular facts of the case. If it was bound to decide affirmatively in this case, I should be inclined to think that there was enough known about Lennard to show that, to use the appellants' learned counsel's own phrase, he was the alter ego of the company. He was a director of the company. I can quite conceive that a company may, by intrusting its business to one director, be as truly represented by that one director as in ordinary cases it is represented by the whole board. I am quite sure that you cannot at least put as a general proposition in law that it is true that nothing will ever be the actual fault or privity of an incorporated company unless it is the actual fault of the whole board of directors. But I think the true criterion of the case is that which was found and applied by HAMILTON, L.J., in the Court of Appeal that the parties who plead s. 502 must bring themselves within its terms; and, therefore, the question is—Has the company freed itself by showing that this arose without its actual fault or privity? I think it has not. Lennard may have been deputed by the company to do all these things, or, again, there might have been liability upon the ground that Lennard had told the whole body of directors, and that they knew and sent him the money, and so on. Anyway, they have not discharged the onus which was upon them, and I, therefore, concur in the motion which has been made by my noble and learned friend on the Woolsack.

LORD ATKINSON.—I concur.

LORD PARKER OF WADDINGTON.—I concur.

LORD PARMOOR.—I concur.

Appeal dismissed.

Solicitors: *Downing, Handcock, Middleton & Lewis*, for *Bolam, Middleton & Co.*, Sunderland; *Parker, Garrett, & Co.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

GILES *v.* RANDALL

[Court of Appeal (Buckley and Pickford L.JJ.), November 17, 18, 1914]

[Reported [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; 59 Sol. Jo. 131]

Costs—Taxation—Standard to be adopted—Terms of settlement—Solicitor and client costs to be taxed if necessary.

By R.S.C., Ord. 65, r. 27 (29): "On every taxation the taxing master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses."

A settlement was agreed of an action brought by the plaintiff against the defendant, and the judgment as drawn up stated that "the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary)". On taxation, the taxing master disallowed or reduced in amount a large number of items including charges for instructions for briefs and counsels' fees on the grounds that the latter part of R.S.C., Ord. 65, r. 27 (29), applied, and in effect gave little more than a taxation as between party and party.

Held: the latter part of r. 27 (29) applied and the taxing master had applied the correct standard for taxation.

Notes. Distinguished: *Goodwin* v. *Storrar*, [1947] 1 All E.R. 203. Applied and explained: *Reed* v. *Gray*, [1952] 1 All E.R. 241. Referred to: *Gibbs* v. *Gibbs*, [1952] 1 All E.R. 942; *Re Dargie*, *Miller* v. *Thornton-Jones*, [1953] 2 All E.R. 577; *Francis* v. *Francis and Dickerson*, [1955] 3 All E.R. 836.

As to the amount and allowance of costs as between solicitor and client, see 30 Halsbury's Laws (3rd Edn.) 426–439; and for cases see Digest (Practice) 899, 900.

Cases referred to:

(1) *Ryan* v. *Dolan* (1872), I.R. 7 Eq. 92.

(2) *Re Harrison* (1886), 33 Ch.D. 52; 55 L.J.Ch. 768; 55 L.T. 72; 50 J.P. 372; 34 W.R. 645; 2 T.L.R. 671, C.A.; Digest (Practice) 936, *4753.*

(3) *Cavendish* v. *Strutt*, [1904] 1 Ch. 524; 73 L.J.Ch. 247; 90 L.T. 500; 52 W.R. 333; 20 T.L.R. 99; 48 Sol. Jo. 116; Digest (Practice) 936, *4755.*

Also referred to in argument:

Re Ermen, *Tatham* v. *Ermen*, [1903] 2 Ch. 156; 72 L.J.Ch. 492; 88 L.T. 353; 51 W.R. 475; 47 Sol. Jo. 494; Digest (Practice) 947, *4873.*

Appeal from a decision of Scrutton, J., on a summons to review taxation.

The taxing master explained why he had disallowed or reduced certain items by saying:

It is well settled that there are various forms of taxation as between solicitor and client. (i) Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party. (ii) Where the costs are payable out of a general common fund. (iii) Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another. The taxation in the case of (iii), which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed. The opinion was expressed in *Ryan* v. *Dolan* (1) (I.R.

7 Eq. at p. 94) that as to solicitor and client, costs payable by another party the rules are, "liability to the solicitor and fair justice to the opposite party"; but this must now be read with Ord. 65, r. 27, which applies to all taxations (see *Re Harrison* (2)). Regulation 29 of that order precludes the allowance save as against the party who incurred them of costs which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses. I have taxed accordingly. Subject to the above the objections do not involve any question of principle. They relate only to matters of quantum and detail. The allowances and disallowances were made after very much consideration of all the circumstances of the case and after hearing the arguments of counsel on the objections. I have carefully reconsidered my allowances and made further allowances in some instances, and I am of opinion that I have taxed the costs on the proper principle, and made all proper and necessary allowances.

R. J. Sutcliffe for the plaintiff.
W. Whateley for the defendant.

BUCKLEY, L.J.—Before this action came to trial terms were settled between the parties. If we had any right to inquire into the settlement it would probably be found that it was intended that the plaintiff should receive £500 as damages, and not be out of pocket in respect of the costs. That, however, is not the question we have to consider. The terms are in the judgment as drawn up, and the only question is what is the proper taxation of costs under that judgment. That judgment is "that the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary)." The words "if necessary" merely mean that if the parties can agree as to costs there shall be no taxation; if they cannot agree, there is to be a taxation. Those words throw no light upon the question upon what principle the costs are to be taxed as between solicitor and client.

There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of casts, which is commonly called taxation "as between solicitor and own client." The second is where the costs are to be paid out of a common fund in which the person entitled to the costs and others are interested. The present case does not come within either of those two classes. The third case is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. This case falls within the last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is now too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. Persons entitled to costs under an order to tax as between solicitor and client probably think that they will get something in the nature of an indemnity.

In these circumstances the taxing master has here taxed the costs upon the footing that the latter part of Ord. 65, r. 27 (29) applies. The history of that sub-rule is as follows: As it stood before the alteration in 1902 it was negative in form, and was confined to costs as between party and party. It ran thus:

"As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear

to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party."

In January, 1902, this sub-rule was so altered as that the first part was reproduced in an affirmative form and was made to extend to every taxation. It now runs thus

"On every taxation the taxing master shall allow all such costs, charges, and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party."

The negative character of this part of the old sub-rule disappears and becomes affirmative. So far there is a direction to the taxing master to allow something. Those affirmative words do not include the costs dealt with in the latter part of the old sub-rule. Those costs are remitted to the latter part of the new sub-rule, which runs thus:

"But save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses."

Here I find reproduced under negative words the latter part of the old sub-rule. The meaning is this: The earlier part of the new sub-rule says that the taxing master shall allow a certain class of costs. The latter part says that, except in one particular case, certain costs shall not be allowed. The excepted case is that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect says affirmatively that as between solicitor and own client those costs may be allowed, but that in every other case they shall not. The other cases include taxation as between solicitor and client as distinguished from taxation as between solicitor and own client. Accordingly upon such a taxation as this the costs described in the latter part of sub-r. (29) shall not be allowed. The taxing master in this case has proceeded on that footing. He says

"The taxation in the case of (iii), which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed."

That, however, is not very well expressed. "Necessary letters to and attendances on the client" are allowed as between party and party and therefore, though taxation as between solicitor and client gives little more than as between party and party, the letters and attendances there referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing master further says:

"Regulation 29 of that order precludes the allowance, save as against the party who incurred them, of costs which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel, or special charges or expenses to witnesses or other persons, or by other unusual expenses. I have taxed accordingly."

The taxing master, therefore, has taxed this bill of costs on the footing that the latter part of sub-r. (29) applies. For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as are there mentioned are not to be allowed.

That is the only question of principle argued before us, and this court does not interefere on questions of quantum. The appeal must be dismissed.

PICKFORD, L.J.—I am of the same opinion. The action was settled on the terms that judgment should be entered for the plaintiff for £500 with costs as

between solicitor and client to be taxed (if necessary). I agree that the words "if necessary" are not of any materiality here.

The taxing master has taxed off the bill a large amount, and, from one point of view, I regret that I feel bound to affirm his decision, because I do not think that the plaintiff has got what she supposed she would get when these terms were agreed upon. She accepted the terms of settlement because she thought that she would get all that she would have to pay to her solicitor. She does not, however, get that under the practice as to taxation as it now stands. Logically, costs as between solicitor and client can only mean one thing—namely, such costs as are properly chargeable between a solicitor and his client, and as are properly payable by the client to his solicitor. It seems that it is irrelevant to inquire from what source the payment is to come, or by whom the payment is to be made; the costs ought to be measured in the same way whether the client has made a bargain that he shall receive those costs from someone else or not. But a different rule of practice in fact prevails, and the taxing master must according to that practice look in each case to the source from which the payment is to come. In DANIELL'S CHANCERY PRACTICE (8th Edn.), p. 1078, it is said, dealing with taxation of costs as between solicitor and client, that

> "a distinction is made: first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund in which the party entitled to costs has only a limited interest; and thirdly, where such costs are payable out of a fund belonging exclusively to such party himself. These distinctions, however, are not made in the order directing the taxation, but only where the order is acted upon by the taxing officer; and if it is intended that the party whose costs are to be paid out of a general fund should be fully indemnified against all expenses, or against any expenses not strictly costs of action, care must be taken to have it so expressed in the ordinary order; as the direction that the costs are to be taxed as between solicitor and client will not, in such a case, be sufficient."

The distinction has been in existence for a long time, and we cannot now disregard it. It is frequently provided against by inserting words in the order giving an indemnity against all costs, or stating that there shall be no taxation of certain items, such as counsel's fees. Under that practice the taxation in this case is not really a taxation as between solicitor and client at all, but is a taxation as against the person who has to pay the costs. The question is what costs are properly chargeable as against him under an order for taxation as between solicitor and client. Is the taxing master right in saying that the second part of Ord. 65, r. 27 (29), applies to this taxation? The first part of the sub-rule applies to all taxations. *Cavendish* v. *Strutt* (3) is relied upon as an authority for saying that the second part of sub-r. (29) only applies to taxation as between party and party. In that case BUCKLEY, J., said ([1904] 1 Ch. at p. 530) that

> "the second part applies only to taxation as between party and party, for by the words, 'save as against the party who incurred the same,' it excepts a taxation as between solicitor and client."

But it is clear what that passage means. The learned judge had in mind a taxation as between solicitor and his own client who had to pay, and he was contrasting that with a taxation as between party and party. He was not considering the different forms of taxation as between solicitor and client. His reference to the words "save as against the party who incurred the same" shows that. According to the practice of taxation which has grown up upon, so far as I can see, no intelligible principle, this taxation is really not a taxation of costs properly chargeable by a solicitor to his client. As soon as one arrives at that conclusion it follows that the case comes within the second part of sub-r. (29), because the taxation here is not a taxation as between a solicitor and his own client, which is the only case excepted out of the second part of the sub-rule. If there had not

been this practice I should have decided otherwise. But the practice applies, and this taxation is really a taxation as against a party who has agreed to pay the costs.

Appeal dismissed.

Solicitors: *Hughes, Bartlett & Thornton*; *Stanley Evans & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

Re WILLS. WILLS *v.* HAMILTON

[CHANCERY DIVISION (Sargant, J.,), March 16, 1915]

[Reported [1915] 1 Ch. 769; 84 L.J.Ch. 580; 113 L.T. 138; 59 Sol. Jo. 477]

Administration of Estates—Fund for payments of debts, legacies, and testamentary expenses—Delay before payment—Rule in Allhusen *v.* Whittell—*Rights of tenants for life—Rate of interest.*

A testator by his will, dated Dec. 14, 1908, gave his real and personal estate not otherwise disposed of to his trustees in trust to sell and pay out of the proceeds all debts, legacies, funeral and testamentary expenses, annuities, and duties, and to divide the residue into nine equal shares and to invest and pay the income of one-ninth share to each of his three daughters during her life with remainders over. He further authorised his trustees to postpone the sale and conversion of the whole or any part as long as they should think proper, and directed that the income from his estate should after his death be treated as income and no part of it added to the capital. Payments in respect of the estate were not concluded until five years after the testator's death. On a question of the adjustment of the accounts as between the tenants for life and the remaindermen of the daughters' shares and whether a scheme devised by the accountants for the estate should be adopted or not,

Held: (i) the rule in *Allhusen* v. *Whittell* (1) was not excluded by the terms of the will, and, therefore, the tenants for life should be treated as deprived only of such a sum as together with the income on that sum would be sufficient to discharge the liabilities; (ii) the tenants for life were not entitled to the income of any part of the estate which was used for the payment of debts paid after the expiration of the first year: *Re McEuen* (2), [1913] 2 Ch. 704, applied; (iii) the rate of interest ought to be calculated on the average rate of interest in each year since all the figures had been worked out.

Notes. Referred: *Corbett* v. *I.R.Comrs.*, [1937] 4 All E.R. 700.

As to the rule in *Allhusen* v. *Whittell* (1), see 16 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 23 DIGEST (Repl.) 475 et seq.

Cases referred to:

(1) *Allhusen* v. *Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest (Repl.) 475, *5450*.

(2) *Re McEuen*, *McEuen* v. *Phelps*, [1913] 2 Ch. 704; 88 L.J.Ch. 66; 30 T.L.R. 44; sub nom. *Re McEwen*, *McEwen* v. *Phelps*, 109 L.T. 701; 58 Sol. Jo. 82, C.A.; 23 Digest (Repl.) 475, *5451*.

Adjourned Summons.

Sir Frederick Wills by his will, dated Dec. 14, 1908, gave his real and personal

estate not otherwise disposed of and therein referred to as his residuary estate to his trustees in trust to sell, call in, convert into money, and out of the proceeds arising from such sale, calling in, and conversion to pay or provide for just debts, funeral and testamentary expenses, legacies, and annuities bequeathed by the will and all the duties directed to be paid, and to divide the residue thereof into nine equal parts and to pay or transfer three-ninth shares to his son Gilbert absolutely and another three-ninths to his son Frederick, and as to one other ninth share to invest the same and hold it upon trust to pay the income thereof to his daughter Edith for her life with restraint from anticipation with a general power of appointment by will with remainder in default of appointment to children at twenty-one or marriage. There was a similar provision for two other daughters, Margaret and Kathleen. By cl. 15 he provided as follows:

> My trustees or trustee may postpone the sale, calling in, or conversion and collection of all or any part of my real and personal estate not specifically devised or bequeathed so long as they or he shall think proper, but such real estate shall for the purpose of transmission be deemed to be of the quality of personalty as from my death, and my trustees or trustee may manage, let upon lease or from year to year such real estate at rack-rental, and may make any outlay for improvements, repairs, insurance, calls upon share premiums on policies or for any other purpose for the benefit of my said real and personal estate which they or he may think proper. And I direct that the income from my estate howsoever invested shall as from my death be treated as income, and no part thereof shall be added to capital.

The testator died on Feb. 18, 1909, and his will was proved on April 21, 1909, and consisted of real and personal estate of great value. All three daughters married and survived the testator. The eldest, Edith, had no issue; the other two had one child each, all of whom appeared as defendants. The payments required to be made out of the residuary estate in respect of debts, legacies, &c., were not concluded until five years from the date of the testator's death, and this summons was taken out by the trustees for the determination of the question how the accounts between the tenants for life and the remainderman of the daughters' shares should be adjusted. It appeared in evidence that from the date of the testator's death the accounts of the estate had been in the hands of Sir William Plender's firm, who submitted the following scheme. That the total residuary estate should be treated as representing two separate funds—namely, (a) the deductible fund, and (b) the net residue fund, after making the deduction—and that no income subsequent to the death should be considered as forming part of the deductible fund. In the absence of a special direction in the will the income arising from the deductible fund, computed from the date of the death to the dates of payment of the liabilities, which it was set aside to discharge, should be added to the net residue of the estate. That the interest on the deductible fund ought to be calculated at the average rate of interest earned by the estate, and not at a hard and fast rate such as 4 per cent. per annum, and that it ought to be calculated over the whole period or periods during which payments and appropriations were made from and out of the deductible fund.

Alexander Grant, K.C., and *R. F. MacSwinney* for the trustees.

Mark Romer, K.C., and *E. Knowles Corrie* for the tenants for life.

E. W. Martelli, K.C., and *H. J. H. Mackay* for the infants.

SARGANT, J.—These are questions arising on the administration of the estate of the late Sir Frederick Wills, and the points at issue, though they involve considerable sums, involve sums which are comparatively small in proportion to the whole amount of the estate and which are only appreciable because of the very large amount of the estate.

The questions arise on the principle of law with regard to the application of the doctrine of *Allhusen* v. *Whittell* (1) as interpreted by myself in *Re McEuen* (2).

The first question I have to decide is whether the rule in *Allhusen* v. *Whittell* (1) is excluded altogether by certain expressions in the will of the testator. In my judgment those expressions are not sufficient to exclude the rule, and it has to be applied in this case. The second question on the summons is whether in applying the rule you ought to form for the purpose of calculation what is called a deductible fund—namely, the fund necessary to pay the liabilities and deprive the tenant for life of income on that deductible fund during the first year—I am only dealing with the first year at present for the purpose of simplicity—and then add the interest on the deductible fund at the end of the year to the capital that is left and give the tenant for life thereafter the income on the capital that is left plus the interest so added to the capital, or whether you ought to treat the tenant for life as deprived only of such a sum as together with the income on that sum will be sufficient to discharge the liabilities. In my opinion the latter is the true principle, although I quite recognise that in many cases the calculation on the former principle would be a slightly easier one. The rule as stated in *Allhusen* v. *Whittell* (1) is clear; it is in the Vice-Chancellor's judgment (L.R. 4 Eq. at p. 302) and it is:

> "That every tenant for life of residue is entitled to the income of all such part of the residue as is not required for the payment of debts and which is found to be in a proper state of investment,"

and then he says that a sort of equitable book-keeping has to be indulged in by the court for the purpose of arriving at the true result. Here I do not see how the income which the tenant for life is to be entitled to is to be one sum during the first year and a larger sum at the end of the first year. A calculation must be adopted under which the residue will be the same throughout the whole period.

Then comes the question whether the process of *Allhusen* v. *Whittell* (1) is to be continued after the expiration of the first year in cases where, as here, large sums in respect of liabilities—using the term broadly—are expended after the expiration of the first year. It is suggested that during the period between the end of the first year and the time when those liabilities are discharged in the second or third year, the tenant for life is in some way or other to become entitled to a larger income on a larger fund than will alternately be available for the purposes of the tenant for life and the remaindermen. There again the passage I have quoted from *Allhusen* v. *Whittell* (1) seems to me to be decisive. The portion of the estate required for the payment of debts is no more a part of residue, because the debt does not happen to be paid in the first year. Once it is ascertained that a portion of the estate has got to be applied in payment of a debt, whether that debt is payable in the first year or actually paid in the first year or in the second or third year, that portion of the capital is, ex hypothesi, no portion of the residue. It is excluded by the very definition really of the term residue. I think, therefore, that the dictum—I am not quite sure it was a dictum only—that I stated in *Re McEuen* (2) ([1913] 2 Ch. at p. 717) must be applied, and that the tenants for life are not to be entitled to the income of any part of the estate which is used for the payment of debts paid after the expiration of the first year. With regard to that of course the amount of capital the income on which they will lose will be rather less than in the case of debts paid during the first year, because it will be the income on that part of the capital which together with the income of it for a longer period—namely, down to the second or third year would be sufficient to pay the debts.

Then the question arises at what rate the interest ought to be calculated for this purpose. It is, of course, to the advantage of the remaindermen that the interest should be calculated at as high a rate as possible, because that results in a larger portion of the debts being paid out of income and a smaller relative proportion being paid out of capital. The rate of interest earned by the estate varied between 4·9 per cent. during the first year to 5·9 per cent. during the year ending on Mar. 2, 1912, and then it rose suddenly by reason of the falling in of a

reversion and became equal to 9·3 per cent. As a matter of fact that very high rate of interest is not of importance here because so small an amount of debts remained to be discharged in that year, but I think that the strict rule on which counsel for the infants insists is that you must take the average rate of interest in each year. No doubt in the case of most estates that process would not have to be gone through and a much rougher and readier method of calculation would be sufficient, because really the difference in the two methods would be almost infinitesimal; but here, now that all the figures have been carefully worked out, I do not see any difficulty to prevent the very eminent accountants who have been employed from working out the figures on the strict basis. With regard to the payment of estate duty, estate duty itself carries interest of course at a very low rate—3 per cent.—but there again I think in some small cases, or in the case of estates of comparatively moderate size, it might very often be a good rough and ready rule to allow the interest on the estate duty to be paid out of income, and the capital paid out of capital; but strictly it seems to me that the total amount paid for capital and interest on the estate duty ought to be treated as being the debt or liability discharged, and then with regard to that a portion of capital and of income will be supplied on the principle I have stated.

Solicitors: *Adams & Adams*; *Russell-Cooke & Co.*

[*Reported by* T. de la Poer Beresford, Esq., *Barrister-at-Law.*]

PYMAN STEAMSHIP CO., LTD. *v.* HULL AND BARNSLEY RAIL. CO.

[Court of Appeal (Lord Reading, C.J., Swinfen Eady, L.J. and Bray, J.), February 16, 1915]

[Reported [1915] 2 K.B. 729; 84 L.J.K.B. 1235; 112 L.T. 1103; 31 T.L.R. 243; 13 Asp.M.L.C. 64; 20 Com. Cas. 259]

Negligence—Contracting out of liability—Exception clause—No liability for any accident or damage howsoever arising—Liability for negligence of servants—Contract for use of dry dock—Negligence of dock owners causing damage to ship.

The defendants, who were dockowners, let the dock under contract to the plaintiffs to enable the plaintiffs to have their ship painted. Under the contract the plaintiffs had to pay dock dues and certain other charges. The plaintiffs' ship was damaged while in the dock owing to the unevenness of the block caps on which she rested, which was due to the negligence of the defendants. By cl. 9 of the defendants' regulations it was provided that: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in, the graving dock, whatever may be the nature of such accident or damage or howsoever arising."

Held: the words "or howsoever arising" in cl. 9 must be construed as having the widest possible application: *Joseph Travers & Sons, Ltd.* v. *Cooper* (1), ante, p. 104, applied; and cl. 9 was wide enough to exclude liability on the part of the dockowners since what was intended by the parties when they entered into the contract was that the dock should be used by the shipowners

with all its appurtenances but at the shipowners' risk.

Per LORD READING, C.J.: Even if there had been a breach of a fundamental or initial obligation of the contract, cl. 9 was wide enough to cover the failure to perform any such obligation and covered negligence arising from a want of care in the performance of such obligation.

Decision of BAILHACHE, J., [1914] 2 K.B. 788, affirmed.

Notes. Referred to: *Liebigs Extract of Meat Co.*, [1918] 2 K.B. 381; *Reynolds* v. *Boston Deep Sea Fishing and Ice Co.* (1921), 38 T.L.R. 22; *Beaumont-Thomas* v. *Blue Star Line, Ltd.*, [1939] 3 All E.R. 127.

As to the liabilities of harbour authorities, see 30 HALSBURY'S LAWS (3rd Edn.) 829 et seq.; and for cases see 41 DIGEST 975 et seq.

Cases referred to:

(1) *Joseph Travers & Sons, Ltd.* v. *Cooper*, ante, p. 104; [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 30 T.L.R. 703; 12 Asp.M.L.C. 561; 20 Com. Cas. 44, C.A.; 8 Digest (Repl.) 46, *278*.

(2) *The West Cock*, [1911] P. 208; 80 L.J.P. 97; 104 L.T. 736; 27 T.L.R. 301; 55 Sol. Jo. 329; 12 Asp.M.L.C. 57, C.A.; 41 Digest 676, *5055*.

(3) *Tattersall* v. *National Steamship Co.* (1884), 12 Q.B.D. 297; 53 L.J.Q.B. 332; 50 L.T. 299; 32 W.R. 566; 5 Asp.M.L.C. 206; 41 Digest 496, *3245*.

Also referred to in argument:

Steel v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

Hyman v. *Nye* (1881), 6 Q.B.D. 685; 44 L.T. 919; 45 J.P. 554; 3 Digest (Repl.) 96, *239*.

Price & Co. v. *Union Lighterage Co.*, [1904] 1 K.B. 412; 73 L.J.K.B. 222; 89 L.T. 731; 52 W.R. 325; 20 T.L.R. 177; 48 Sol. Jo. 207; 9 Com. Cas. 120, C.A.; 41 Digest 426, *2677*.

Randall v. *Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 25 W.R. 313, C.A.; 39 Digest 440, *694*.

The Forfarshire, [1908] P. 339; 78 L.J.P. 44; 99 L.T. 587; 11 Asp.M.L.C. 158; 41 Digest 684, *5132*.

Morris and Morris v. *Oceanic Steam Navigation Co., Ltd.*, (1900), 16 T.L.R. 533; 41 Digest 474, *3061*.

Hart v. *Pennsylvania Railroad Co.* (1884), 112 U.S. 331.

Chartered Bank of India, Australia and China v. *British India Steam Navigation Co., Ltd.*, [1909] A.C. 369; 78 L.J.P.C. 111; 100 L.T. 661; 25 T.L.R. 480; 53 Sol. Jo. 446; 11 Asp.M.L.C. 245; 14 Com. Cas. 189, P.C.; 41 Digest 538, *3653*.

Mersey Docks Trustees v. *Gibbs*, *Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 41 Digest 977, *8665*.

Bede Steamship Co. v. *River Wear Comrs.*, [1907] 1 K.B. 310; 76 L.J.K.B. 434; 96 L.T. 370; 10 Asp.M.L.C. 370, C.A.; 41 Digest 979, *8677*.

Nelson Line (Liverpool), Ltd. v. *Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 24 T.L.R. 114; 52 Sol. Jo. 170; 10 Asp.M.L.C. 581; 13 Com. Cas. 104, H.L.; 41 Digest 474, *3056*.

Appeal by the shipowners from a judgment of BAILHACHE, J.

Adair Roche, K.C., and *W. N. Raeburn* for the plaintiffs.

Maurice Hill, K.C., and *Burt* (for *Moss-Blundell*) for the defendants.

LORD READING, C.J.—This is an appeal by the plaintiffs from a judgment of BAILHACHE, J., sitting without a jury, who gave judgment for the defendants. The plaintiffs are steamship owners, and the defendants a railway company, who also carry on business as owners of dry docks. The question relates to the defendants' obligation in the capacity of dry-dock owners. The steamship *Marmion* owned by

the plaintiff company, entered the defendants' dry dock, and in consequence of the set of blocks which were provided for the ship to rest upon in the dock not having been evenly placed by those responsible for the working of the dock, damage was caused to the *Marmion's* bottom. The amount of that damage measured in money has been estimated by the learned judge at £284. The question upon which the case has turned is whether or not cl. 9 of the defendants' regulations, which are incorporated in the contract between the plaintiffs and the defendants, excludes the defendants from liability for negligence in the performance of their contract to provide blocks, or for failure to provide blocks, as fit and proper as care and skill could possibly make them. No question arises upon this appeal as to the negligence of the defendants, or as to their failure to perform the obligation to provide fit and proper blocks, or to use blocks which were placed in a fit and proper way so as to support the vessel without causing it damage. The learned judge has found that there was such negligence or failure to perform, and that finding of fact has not been challenged. The learned judge, however, exempted the defendants from liability, and gave judgment in their favour, because he felt bound to give effect to his interpretation and construction of cl. 9 of the regulations, and everything in this appeal turns upon the meaning to be attributed to the words of this cl. 9.

The contract between the parties is for the use of the defendants' graving dock by the steamer *Marmion*, and the plaintiffs further

> "accept, agree to, and undertake to act in conformity with the company's graving dock regulations in force in respect of such user of the dock as per printed copy thereof forming part of this agreement, and engage prior to the vessel leaving the company's dock to pay the graving dock rent, pumping, and user of block caps at the following rates."

Then follow certain rates provided for the pumping, the rent, and the use of the block caps. The regulations which formed part of the contract are: "The company's graving dock must be used subject to their regulations and to the following conditions." Then cl. 9 runs as follows:

> "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into or out of or whilst in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising, nor for loss occasioned by delay in getting vessels into or out of the dock; nor shall the company be liable for any injury to persons employed at vessels while using the graving dock."

Looking at the language of this clause, and given its ordinary significance, the words undoubtedly are wide enough to cover an exemption to the dockowners from all liability arising from the user of the graving dock. I think that when one speaks of the user of the graving dock with all its appurtenances for use as a graving dock, that means the graving dock with block caps, pumps, horizontal shores, trestles, and staging planks, which are all requisites of the user of a graving dock. The word "user" certainly goes far enough. In the first instance it is said that the owner of a vessel using the dock must do so at his own risk. Then the company are not to be responsible for any accident or damage, whatever may be the nature of the accident or damage, or howsoever arising. With reference to those last words "or howsoever arising," there has been undoubtedly some difficulty in arriving at the true view, and as to whether those words are to be construed as meaning arising from any cause whatever, and whether they would be sufficient to release the contractors from liability caused by any negligence. It is sufficient for the purpose of this case to say that, although the point is raised before us as to the meaning of those words for the purpose of saving the point should it be thought desirable to raise it elsewhere, the decision in *Joseph Travers & Sons, Ltd.* v. *Cooper* (1) is binding upon this court, and therefore we are bound

to hold, and do hold, that those words must be construed as having the widest possible application.

The plaintiffs say that, notwithstanding that they must admit for the purpose of this case that *Joseph Travers & Sons, Ltd.* v. *Cooper* (1) binds this court, and that, therefore, those words must be read with the very widest meaning to which I have already referred, those words "howsoever arising," looking at the contract as a whole, and bearing in mind its nature, terms, and—they add—the sequence of clauses, this court should come to the conclusion that this clause was intended to have only a limited operation, and that full effect could be given to the words of the agreement, and the language used in that clause, if we so construed it as to limit its operation to accident or damage to the vessel once it has arrived in the graving dock, and for anything that might occur in the graving dock, but that the clause should not apply to the obligations imposed upon the dockowner to provide proper block caps for use in the dock. They said that it is not necessary that the language should be so construed; that, looking at the decisions to which our attention has been called, the courts have construed, not these words, but somewhat similar words, in a limited sense, and therefore, we should do the same in this case.

The argument which was addressed to us was that this obligation to provide block caps is, in the language used in the discussion in the case, a fundamental obligation of the contract. Sometimes, it is said, it is a "primary object of the contract," or it is one of the "initial obligations of the contract." I do not propose, in deciding this case, to discuss the exact meaning to be given to those expressions, because it seems to me that their meaning does not arise for our decision in this case. It seems to me that assuming, as I will for the purpose of the argument, that this obligation to provide blocks and block caps is a fundamental or initial obligation of the contract, the language used in cl. 9 is such that we must read it as covering failure to perform any such obligation, and covering negligence arising from a want of care in the performance of such obligation. Looking at the clause from the various points of view that have been put forward to us by counsel for the plaintiffs, it seems to me that one must inevitably arrive at the conclusion that what was intended by the parties when they entered into this contract was that the graving dock should be used with all its appurtenances, but it should be used at the owners' risk. The shipowners were to make certain payments for the use of the dock, and for the use of the blocks and other appurtenances, but in no case were they to have any claim against the owners of the dock for any accident or damage which might be caused to their vessel. This seems to me to dispose entirely of the case, and to make it unnecessary to discuss the various authorities to which our attention has been called. In all these cases there has been considerable difficulty in arriving at a reconciliation of all the authorities and decisions upon the meaning of clauses in contracts of this description. In truth those decisions turned upon the actual words of the clause. The principle which is to be deduced from them is, I think, as counsel for the plaintiffs rightly contended, that it may be that by the language employed and the subject-matter of the contract one is able to find that the clause was intended by the parties to be read only in the limited sense, and that when one has an absolute obligation, such as, for example, the warranty of seaworthiness in a ship, and a contract of carriage or affreightment is entered into, one must find from the language of the contract words which indicate that it was intended to exempt the shipowner from liability for breach of that warranty, and that one would not ordinarily read into words of general exemption an extension of the exemption to such an obligation as that. But, even so, it is quite plain that in law the language used may be sufficient to exclude the shipowners even from such an obligation. It may be by express words; it may be by necessary implication to be gathered from the language which has been used in the contract; but in any event you must find in the contract words which would justify the exemption of the shipowner for a breach of

that obligation, and, unless you do find them quite clearly, the courts have said that he is to be held liable.

I only wish to add one word upon an argument addressed to us that because this exemption clause is to be found in cl. 9 of the regulations and the provisions with regard to the blocks, which are to be found in clls. 11 and 12 of the regulations, that therefore we are to infer that the provisions as to the blocks were not included in the exemption in cl. 9, but that we must read that as applying only to the obligations which preceded cl. 9. I think it impossible to give effect to that argument. One clause must succeed the other. If there is to be more than the one clause, there must be some order, and it is impossible to say that because of the numbers that are given to the clauses, or because one clause follows another, therefore you are to eliminate the meaning which you would otherwise give to the words. It seems to me to come back to this: that in this position everything must depend upon the meaning to be given to the words of cl. 9, and if they have the wide application which I think they must have, having regard to the language used in the clause, then it must follow, whatever the position in which we may find the clause, that the dockowners are exempted from this liability. Therefore, in my judgment though, perhaps, not for the same reasons, I agree with the decision of BAILHACHE, J., and think that this appeal must be dismissed.

SWINFEN EADY, L.J.—The plaintiffs' ship suffered damage in the defendants' graving dock. It appears that the tops of the blocks on which the ship *Marmion* rested were uneven in height, and when, after the water was let out of the dock, the ship took the ground, it rested unevenly on those blocks, whereby the frame sustained some strain, and the forward plates were set up and damaged; and in consequence of that the ship sustained damage to the extent of some £284. The question which arises in this action is whether the defendants, the dock company, are liable for the amount of that damage.

The ship entered the graving dock under the terms of a contract in writing, and, in my opinion, the rights of the parties depend upon the true construction of the contract. There is no doubt that the vessel sustained this damage whilst in the graving dock. [HIS LORDSHIP read cl. 9 of the defendants' regulations, and continued:] Primâ facie it is obvious the language of that clause covers the events that have happened here. The ship sustained damage while in the graving dock, and the provision is that, whatever the nature of the accident or damage or howsoever arising, the dock company are not to be liable, and that the owner of a vessel is to use the dock at his own risk. But then it is said that although those are general words of wide import, they are not to be construed in this case so as to exclude the liability of the dockowner for damage, because the damage arises in the present case, it is true, while the vessel was in the dock, but in consequence of a neglect of the defendants to provide proper block caps, and that ought to have been done before the vessel entered the dock, and that there was a fundamental obligation, any obligation which went to the whole root of the contract, to provide block caps in proper position on which the vessel could safely take the ground. Therefore it is like the cases of unseaworthiness, where the obligation of the shipowner is to provide a ship that shall be seaworthy; and reliance was placed on cases that have arisen, mostly cases with regard to ships, where it has been held that the obligation of the shipowner is such that the exemption from damage occurring by particular clauses in the contract extends only to damage that shall arise after the voyage has commenced, and not to damage arising from the unseaworthy condition of the ship which the shipowner supplied. For instance, one of the cases cited, *The West Cock* (2), was a case of towing, and there it was held that the special conditions of exemption for damage related only to defects occurring after the commencement of the voyage and not to a pre-existing defect in the tug. Similarly, *Tattersall* v. *National Steamship Co.* (3) was a case where cattle caught foot-and-mouth disease from being placed on an infected ship which was not seaworthy for that purpose. At the commencement of the voyage the ship

was unfit for the purpose, and therefore the terms of the contract relied upon only related to the carriage of the goods upon the voyage, and the damage arose from the unseaworthy condition of the ship before the commencement of the voyage.

Cases of that kind were prayed in aid in support of the argument in the present case. It seems to me they have no application to it. Here the contract was for the use of a particular dock which is described in the contract. The shipowner was to use that dock at his own risk, and whatever the damage arose from while the vessel was in that dock, in my opinion, it is covered by cl. 9, and the dockowner is exempted from liability. It is not a case of whether the shipowner has or has not to pay for block caps not provided in accordance with the contract. It is not that case at all. It is a case whether the dock company is liable for the damage to the ship by reason of not providing block caps which were suitable and of the requisite height. In my opinion the exemption from damage is comprised in and entirely covered by cl. 9, and on that ground the plaintiffs are not entitled to recover against the owners of the dock, and the appeal should be dismissed.

BRAY, J.—I am of the same opinion. What we have to do here is to construe cl. 9 of the regulations having reference to the remaining clauses of the contract. We have had considerable argument as to what is a fundamental obligation, and as to whether that includes cases where the liability is absolute, or where the liability is only to use reasonable care or all possible care. I think it is unnecessary to go into those considerations. I will assume for the moment here that there was as to the graving dock, and as to the blocks, the duty, and, if you like, the absolute duty, to provide a fit dock and proper block caps put in proper position. I do not say that it is the construction of the contract, but for the purpose of this case I am willing to assume it. I should, however, like to guard myself especially against saying that there was any absolute contract to provide a fit dock here. There was a warranty of some kind. For the purpose of this case I assume it was as wide as possible.

The question which remains is this: Whether cl. 9 of the regulations is wide enough to exempt the defendants from a breach of contract in respect of that liability. The clause begins in these words: "The owner of a vessel using the graving dock must do so at his own risk." The words "owner's risk" and the meaning of those words are now well known, particularly in the contracts of railway companies. Railway companies, in carrying goods, are under certain obligations under the Railway and Canal Acts, and they have to give a choice of two rates. One rate is called the ordinary rate, and the other is called the "owner's risk rate"; and the owner's risk rate covers what is meant by "owner's risk." It means what it says. The clause begins with the words I have read, and then it follows on explaining the meaning of those words, and making sure that they are to include every possible damage:

> "Any accident or damage to a vessel going into or out of or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising."

It is difficult to use wider words than those, and although undoubtedly we must see that the construction that we are proposing to put upon this clause is a clear construction, because ambiguous words are not sufficient, and the words must be clear in order to exempt from a liability which would otherwise enure, yet it seems to me that these words are quite clear so far as regards the graving dock. Now, it is quite true that we must read the words "graving dock" as meaning something more than the dock itself in order to exempt the company here. I think the remaining words of the section are sufficient to show that, because it is "any accident or damage" following the words that I have read. There is cl. 13, which says: "The owner of any vessel using the graving dock will be held responsible to the company should any person employed in connection with the vessel cut, destroy, or injure the walls, floor, or any of the blocks, machines, pitch boilers, cranes, tackle, or other appendages to the graving dock." In my opinion, the

words "graving dock" in cl. 9 include the graving dock and all its appendages. I do not think it is material to notice the exact position of these clauses. I cannot think that it could have been the intention of the parties that the defendants should be exempted from all liability for any defect in the dock in carrying on the business of the dock, and that, although they are exempt from that liability with regard to the dock, are yet to be liable in respect of such small things as these block caps. In my opinion the decision of BAILHACHE, J., was right.

Appeal dismissed.

Solicitors: *Botterell & Roche*, for *Botterell, Roche & Temperley*, West Hartlepool; *Davenport Cunliffe & Blake*, for *Moss, Lowe & Co.*, Hull.

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

STEEDMAN *v.* DRINKLE AND ANOTHER

[PRIVY COUNCIL (Viscount Haldane, Lord Parker of Waddington and Lord Sumner), December 7, 21, 1915]

[Reported [1916] 1 A.C. 275; 85 L.J.P. 79; 114 L.T. 248; 32 T.L.R. 231]

Specific Performance—Sale of land—Express provision in agreement that time of the essence—Payment by instalments on specified dates.

Sale of Land—Contract—Forfeiture—Relief—Right to keep all instalments paid if purchaser in default of instalment.

By an agreement in writing for the sale of land the purchaser agreed to pay a certain sum by way of deposit and the balance by instalments on specified dates. It was further agreed that, if the purchaser failed to pay an instalment, the vendor would be at liberty to cancel the agreement without notice and retain by way of liquidated damages any payments already made by the purchaser and all improvements made on the premises. Alternatively, the vendor could proceed to another sale and the purchaser would make up any deficiency in price together with costs, charges and expenses.

Held: (i) a decree of specific performance would not be granted as the parties had expressly provided in their agreement that time was to be of the essence of their bargain: *Kilmer* v. *British Columbia Orchard Lands, Ltd.* (1), [1913] A.C. 319, distinguished; (ii) the stipulation as to forfeiture was a penalty and relief would be granted.

Notes. Applied: *Brickles* v. *Snell*, [1916] 2 A.C. 599. Considered: *Mussen* v. *Van Dieman's Land Co.*, [1938] 1 All E.R. 210; *Stockloser* v. *Johnson*, [1954] 1 All E.R. 630.

As to specific performance of contracts where time is of the essence, see 31 HALSBURY'S LAWS (2nd Edn.) 402–405; and for cases see 42 DIGEST 511–514. As to relief against penalties and forfeitures, see 14 HALSBURY'S LAWS (3rd Edn.) 620–623; and for cases see 20 DIGEST 514–521.

Case referred to:

(1) *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A.C. 319; 82 L.J.P.C. 77; 108 L.T. 306; 29 T.L.R. 319; 57 Sol. Jo. 338, P.C.; 20 Digest 517, *2439*.

Also referred to in argument:

Stickney v. *Keeble*, ante, p. 73; [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664, H.L.; 42 Digest 511, *768*.

Re Dagenham (*Thames*) *Dock Co.*, *Ex parte Hulse* (1873), 8 Ch. App. 1022; 43 L.J.Ch. 261; 38 J.P. 180; 21 W.R. 898, L.JJ.; 20 Digest 516, *2438*.

Snell v. *Brickles* (1914), 49 S.C.R. 360; revised sub nom. *Brickles* v. *Snell*, [1916] 2 A.C. 599; 86 L.J.P.C. 22; 115 L.T. 568, P.C.; 42 Digest 513, *779*.

Appeal from a judgment of the Supreme Court of Saskatchewan (Nov. 15, 1913) which reversed a decision of NEWLANDS, J., in an action for specific performance of a written agreement for the sale of land. The facts are set out in the judgment.

Wallace Nesbitt, *K.C.*, and *A. M. Stewart* (both of the Canadian Bar) for the appellant.

Sir Robert Finlay, *K.C.*, and *Malcolm Macnaghten* for the respondents.

Dec. 21, 1915. **VISCOUNT HALDANE.**—This is an appeal from the Supreme Court of Saskatchewan reversing the judgment of NEWLANDS, J., who had dismissed an action for specific performance. The facts were shortly these: James Campbell White agreed by writing, dated Dec. 9, 1909, to sell 160 acres of land in the province to one Loveridge for 16,000 dollars, of which 1,000 dollars were paid on signing the agreement, and the balance was payable in annual instalments on Dec. 1 in each year. Loveridge entered into the agreement on behalf of the respondent, John C. Drinkle, who, along with one Hair, was the real purchaser. In January, 1910, the interest of Hair under the agreement was acquired by the respondent W. R. Drinkle, and on Jan. 24, 1910, Loveridge assigned the agreement to the respondents. Just before this date White died intestate. On April 18, 1910, letters of administration to his estate were granted to Steedman, the appellant, in the province of Ontario, and on May 25, 1911, the grant was re-sealed in the province of Saskatchewan. On July 22, 1910, the appellant, as administrator, purported to approve the assignment.

The material provisions of the agreement, in addition to those already stated, were that the instalments of purchase money and interest thereon were payable at Hamilton, in the province of Ontario; that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned. It was further provided that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned, with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments. It was further agreed that in case the purchaser should make default in any of the payments to be made the vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges and expenses to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions, he might make a declaration by notice to the purchaser, addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

The first deferred instalment, falling due on Dec. 1, 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent, W. R. Drinkle, thereupon, on Dec. 21, tendered the amount due, but the appellant declined to receive it, and repeated this refusal, whereupon another and formal tender was made a few days later. The respondents then brought the

action in which this appeal arises, claiming specific performance, and in the alternative relief from forfeiture under the terms of the agreement. NEWLANDS, J., thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from the forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *British Columbia Orchard Lands, Ltd.* (1), in which it was held on a somewhat similar agreement that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for a penalty and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

As to the relief from forfeiture, their Lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing the judgment of NEWLANDS, J. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach. In the case referred to this appears to have been what happened. For *Kilmer* v. *British Columbia Orchard Lands, Ltd.* (1) was an appeal in which the facts were that the company had sold land for a price to be paid in instalments at specified dates with a clause of forfeiture, in default of punctual payment, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counter-claimed for specific performance. This Board held that as regards the company's claim, the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms. So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counter-claimed.

In the present case there has been no such agreement to extend time, nor anything that amounts to waiver of the right to treat time as of the essence. While, therefore, the court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that there was justification for decreeing

specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the agreement as proposed by the learned judge who tried the case. For this purpose the respondents should have liberty to apply to the court of first instance. For the rest, the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the courts below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Blake & Redden*; *Stanley Evans & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

PRINCESS THURN AND TAXIS *v.* MOFFITT

[Chancery Division (Sargant, J.), October 16, 1914]

[Reported [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26]

Alien—Enemy—Right to sue—Licence to remain in this country during war—Registration under Aliens Restriction Act, 1914.

"When persons are allowed to remain [in this country] either for a specified time after the commencement of war or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country": Hall's International Law (6th Edn.) p. 388.

Both the plaintiff and the defendant claimed to be the wife of Prince Victor of Thurn and Taxis. The plaintiff claimed an injunction restraining the defendant from continuing certain alleged libels consisting of statements that she (the defendant) was the real wife of the prince. The defendant counterclaimed for similar relief. After the declaration of war between Great Britain and Austria in 1914 the plaintiff registered under the Aliens Restriction Act, 1914, as an alien. The defendant applied for an order that all proceedings by the plaintiff be stayed on the grounds: (i) that the plaintiff was an alien enemy and not entitled to relief; and (ii) that, owing to there being a state of war between this country and Austria, she was unable to obtain certain material evidence.

Held: the statement of law in Hall's International Law (6th Edn.), p. 388, was correct; the plaintiff having registered herself under the Act of 1914 was entitled to enforce her claim as the registration amounted at least to a licence to remain in this country; as there was no evidence on the second ground the application was dismissed.

Notes. Section 1 of the Aliens Restriction Act, 1914, has been amended by s. 3 (3) of the British Nationality Act, 1948.

Approved: *Porter* v. *Freudenberg*, *Kreglinger* v. *Samuel and Rosenfeld*, *Re Merten's Patents*, post. Applied: *Schaffenius* v. *Goldberg*, post, p. 387. Followed: *Krauss* v. *Krauss and Orbach* (1919), 35 T.L.R. 637. Referred to: *Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft*, [1919] A.C. 291; *Re N. V. Gebr. Van Udens Scheepvaart en Agentuur, Maatschappij and Sovracht*, [1941] 3 All E.R. 419; *Netz* v. *Ede*, [1946] 1 All E.R. 628; *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 2 All E.R. 434; *Hirsch* v. *Somervell*, [1946] 2 All E.R. 430.

As to the right of an alien to sue, see 1 HALSBURY'S LAWS (3rd Edn.) 499, 501–502; and for cases see 2 DIGEST (Repl.) 241 et seq. For the Aliens Restriction Act, 1914, see 1 HALSBURY'S STATUTES (2nd Edn.) 691. For the British Nationality Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 141.

Case referred to:

(1) *Wells* v. *Williams* (1697), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 242, *440*.

Also referred to in argument:

Janson v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 277, *646*.

Boulton v. *Dobree* (1808), 2 Camp. 163, N.P.; 2 Digest (Repl.) 242, *441*.

Application by a defendant.

The facts are set out in the headnote and in the judgment.

Maurice Barnett for the defendant.

H. A. McCardie for the plaintiff.

SARGANT, J.—This is an application by the defendant to stay all proceedings by the plaintiff in this action on two grounds—first, because the plaintiff is alleged to be an alien enemy, and therefore disentitled to any relief in the courts of this country, and secondly, because the defendant alleges that she is unable to obtain certain material evidence during the continuance of the war.

The first point is of some general importance. There certainly seems to be a general impression that during the continuance of a state of war an alien enemy as such is not entitled to any relief at law as a plaintiff in the courts of this country. The facts of the case, so far as material, appear from the pleadings. By her statement of claim, the plaintiff, Leda Eleanor, described as "Princess Thurn and Taxis (the wife of Victor Prince of Thurn and Taxis)," stated that she was the wife of Victor Prince of Thurn and Taxis, hereditary magnate of Hungary, and was married to him on Nov. 1, 1911, being at that time resident in the United States of America; that the defendant, an unmarried woman residing in London, had written and published a number of libels intended to mean that the plaintiff was not the legal wife of Prince Victor but was living in adultery with him and was falsely and fraudulently assuming a name and title to which she had no right; and claimed an injunction to restrain the defendant from continuing the alleged libels or in any way acting so as to expose the plaintiff to liability or the risk of litigation in respect of any act or default of the defendant and damages. The defendant by her defence denied these statements in the statement of claim and in the alternative pleaded justification and alleged that the plaintiff was not the lawful wife of Prince Victor, but that he in fact was legally married to her (the defendant) on Oct. 12, 1906; she made similar allegation of libel against the plaintiff to those made against her, and also counter-claimed for an injunction and damages.

It is not contended that Prince Victor is an alien enemy as being a subject of Austria Hungary, or that he is abroad and probably engaged in fighting against this country; but although that may be the case so far as Prince Victor is concerned, the plaintiff, who was originally an American lady and has on the view of the facts put forward by her become an alien enemy by virtue of her marriage, resides in the United Kingdom and has duly registered herself under the recent Act and Order in Council. Under that Act and Order the alien enemy suffers certain restrictions upon his ordinary rights of movement; the Secretary of State may order his deportation, and so on, and there can be no doubt that the effect of such registration is to amount at least to a licence to the person to remain in this country; indeed, as I gather from the provisions of the order, the permission really amounts to a command to the alien enemy not to depart from this country without some special leave for the purpose. The law applicable to the circumstances is,

in my opinion, correctly stated in HALL'S INTERNATIONAL LAW (6th Edn.), p. 388, as follows:

> "When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."

That passage is supported by the leading case of *Wells* v. *Williams* (1). That being so, I rather gathered that counsel for the defendant admitted that if Prince Victor had himself been resident in this country and had been registered under the Act the result would have been that the plaintiff would have been entitled to maintain this action, and though he afterwards somewhat receded from this position he certainly adduced no argument to induce me to depart from the statement of the law to which I have referred. Inasmuch, therefore, as the plaintiff is coming to insist on a right which is individual to herself, she has, in my opinion, by virtue of her registration and by virtue of the permission thereby granted to her to reside in this country a clear right to enforce that right in the courts of this country notwithstanding the existence of the state of war. So far, therefore, as regards the general ground on which this application is based I overrule the objection raised by the defendant.

Upon the second point no real evidence has been adduced before me and I also overrule that.

Solicitors: *Harrington, Edwards & Cobban*; *Carter, Harrison & Armstrong.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

SCHMITZ *v.* VAN DER VEEN & CO.

[KING'S BENCH DIVISION (Rowlatt, J.) January 22, February 1, 5, 1915]

[Reported 84 L.J.K.B. 861; 112 L.T. 991; 31 T.L.R. 214]

Trading with the Enemy—Goods sold and delivered before war—Proceeds of sale to be shared by British subject and enemy alien—No benefit to enemy while such—Greater security to enemy of ultimately recovering his share.

The plaintiff claimed for the price of goods sold and delivered to the defendants before the outbreak of war between Great Britain and Germany on Aug. 4, 1914. The goods had been obtained from a German firm for sale by the plaintiff on the terms that any excess over a stipulated price which was obtained on their sale should be divided between the plaintiff and the German firm.

Held: as the sum claimed by the plaintiff had accrued before the war and as there was no intention that the enemy alien, while such, should benefit from the payment, the plaintiff was entitled to recover, although the position of an enemy alien might be improved by his acquiring further security that he would ultimately recover his share of the money.

Notes. The Trading with the Enemy Act, 1914, has been repealed.

Considered: *Stockholms Enskilda Bank Aktiebolog* v. *Schering, Ltd.*, [1941] 1 All E.R. 257; *Weiner* v. *Central Fund for German Jewry*, [1941] 2 All E.R. 29. Referred to: *Tingley* v. *Müller*, [1917] 2 Ch. 144; *Sovracht* (V/O) v. *Van Udens Scheepvaart en Agentuur Maatschappij* (*N.V. Gebr.*), [1943] 1 All E.R. 76.

For cases on rights, duties and disabilities of enemy aliens in general, see

2 DIGEST (Repl.) 212 et seq., and for cases on suits by British subjects representing or jointly interested with alien enemies, see ibid. 249.

Cases referred to:

(1) *Flindt* v. *Waters* (1812), 15 East 260; 104 E.R. 842; 2 Digest (Repl.) 250, *509*.

(2) *Brandon* v. *Nesbitt* (1794), 6 Term Rep. 23; 101 E.R. 415; 2 Digest (Repl.) 254, *548*.

(3) *Bristow* v. *Towers* (1794) 6 Term Rep. 35; 101 E.R. 422; 2 Digest (Repl.) 254, *549*.

(4) *Kensington* v. *Inglis* (1807), 8 East 273; 103 E.R. 346; 2 Digest (Repl.) 255, *552*.

(5) *De Tastet* v. *Taylor* (1812), 4 Taunt. 233; 128 E.R. 318; 2 Digest (Repl.) 281, *684*.

(6) *Daubuz* v. *Morshead* (1815), 6 Taunt. 332; 128 E.R. 1062; 2 Digest (Repl.) 222, *337*.

Also referred to in argument:

Anthon v. *Fisher* (1795), 3 Doug.K.B. 166; 99 E.R. 594; 2 Digest (Repl.) 243, *455*.

Flindt v. *Scott*, *Flindt* v. *Crockatt* (1814), 5 Taunt. 674; 128 E.R. 856; 2 Digest (Repl.) 282, *695*.

Feise v. *Bell* (1811), 4 Taunt. 4; 128 E.R. 227; 2 Digest (Repl.) 283, *701*.

Harman v. *Kingston* (1811), 3 Camp. 150; 2 Digest (Repl.) 212, *261*.

Shepeler (*Schepeler*) v. *Durant* (1854), 14 C.B. 582; 23 L.J.C.P. 140; 2 W.R. 467; 2 C.L.R. 729; 139 E.R. 240; sub nom. *Chepeler* v. *Durant*, 23 L.T.O.S. 79; 2 Digest (Repl.) 250, *506*.

Kershaw v. *Kelsey* (1868), 100 Mass. 561.

Janson v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 51 W.R. 142; 18 T.L.R. 796; 7 Com. Cas. 268, H.L.; 2 Digest (Repl.) 255, *553*.

Hagedorn v. *Bell* (1813), 1 M. & S. 450; 105 E.R. 168; 2 Digest (Repl.) 216, *295*.

Antoine v. *Morshead* (1815), 6 Taunt. 237; 1 Marsh. 558; 128 E.R. 1025; 2 Digest (Repl.) 254, *544*.

Willison v. *Patteson* (1817), 1 Moore, C.P. 133; 7 Taunt. 439; 129 E.R. 176; 2 Digest (Repl.) 254, *546*.

Ex parte Boussmaker (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, *457*.

Furtago v. *Rogers* (1802), 3 Bos. & P. 191; 127 E.R. 105; 2 Digest (Repl.) 254, *550*.

Le Bret v. *Papillon* (1804), 4 East 502; 102 E.R. 923; 2 Digest (Repl.) 250, *508*.

M'Connell v. *Hector* (1802), 3 Bos. & P. 113; 127 E.R. 61; 2 Digest (Repl.) 249, *496*.

Action brought by the plaintiff for the price of goods sold and delivered to the defendants.

By s. 1 of the Trading with the Enemy Act, 1914:

"(1) Any person who during the present war trades or has, since the fourth day of August, 1914, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour. . . . (2) For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy. Provided that any transaction or act permitted by or under any such proclamation shall not be deemed to be trading with the enemy."

By s. 5 of the Trading with the Enemy Proclamation, dated Sept. 9, 1914

"From and after the date of this proclamation the following prohibitions shall have effect . . . and we do hereby accordingly warn all persons resident, carrying on business or being in our dominions: (1) Not to pay any sum of money to or for the benefit of an enemy."

A. H. Spokes for the plaintiff.

G. W. H. Jones and *O'Malley* for the defendants.

Cur. adv. vult.

Feb. 5, 1915. **ROWLATT, J.**, read the following judgment.—In this case the plaintiff, who is a naturalised British subject resident here, sued the defendants, a London firm, for £105 2s. 8d., the price of goods sold and delivered. The first defence was that the plaintiff was not entitled to sue, the contract, so it was contended, being made by him only as agent for a foreign manufacturer, one Arnz, resident in Germany. I decided at the original hearing that the defence failed, the contract being between the plaintiff and the defendants. It was then said that the plaintiff could not recover on the ground that, though the plaintiff might be the principal in the contract with the defendants, nevertheless the relations between him and Arnz were such that the action was for the benefit of Arnz, an alien enemy, and so not maintainable. It was contended for the plaintiff that this point was not open to the defendants, on the ground that by the order made on the Ord. 14 proceedings they were limited to the defences set up by their affidavit, of which this was not one. The order, however, which was in the common form, left it open to me to give leave to raise further points, and, as counsel for the plaintiff in opening had glanced at and endeavoured to discount this defence, and as, moreover, making a payment for the benefit of the enemy is under the recent Acts and proclamations a criminal offence, I thought I ought to hear the objection. As counsel for the plaintiff was not, however, fully prepared I adjourned the case for further argument, and this took place on Feb. 1, when many authorities were cited.

It appears that the arrangements between the plaintiff and Arnz were that the plaintiff ordered from Arnz goods, umbrella silks, for which he had previously obtained orders himself from customers in England, sometimes adding some more in anticipation of being able to place them after arrival. The goods were consigned to the plaintiff by Arnz in bulk, and the plaintiff appropriated and delivered them to the various buyers. The plaintiff was at liberty to sell them at any price he chose above a certain minimum. The excess was divided equally between the plaintiff and Arnz, and the plaintiff also received 3 per cent. commission. The plaintiff was only to pay Arnz if and when he himself received payment, Arnz thus taking the risk of the buyers' default, though of course the plaintiff's share of profit and commission were at his own risk. The course of business was for the plaintiff, when he had collected a certain amount, to send Arnz a cheque for it. He kept a ledger account with Arnz, in which he debited himself with these receipts and credited himself with the cheques to Arnz. Every six months he credited himself in this account with share of profits and commission to date. From these facts it appears to me to be clear that inasmuch as a payment to the plaintiff created an obligation on his part, which would not have arisen without it, to remit the money paid to Arnz, subject to his own claim for half profits and commission, the action was clearly in one sense for the benefit of Arnz. He would obtain the benefit of Schmitz becoming accountable or indebted (it matters not which) to him for the money, which no one was before. He would not, however, obtain the benefit of the payment in the sense of a benefit by way of payment unless Schmitz not only became liable to but did in fact remit.

Certain things are well settled. In the first place, an alien enemy cannot maintain an action in our courts, not because his enemy character constitutes a defence to his claim, but because it deprives him of locus standi. He is, while that character lasts, under a temporary disability to sue. Yet the cause of action,

if otherwise good, is unaffected. But, secondly, in some cases the enemy character does affect the cause of action, as where it is upon an insurance of enemy ships or goods. It being the object of the Crown to destroy the commerce of the enemy, a contract to indemnify him against such loss is or becomes illegal, and there is no cause of action. In such a case, even if the broker, a British subject, sues and the policy was underwritten before the war, the action still fails, and fails finally, not because the beneficiary is an enemy, but because the cause of action is bad. This, as was pointed out in *Flindt* v. *Waters* (1), was the real ground of the decisions in *Brandon* v. *Nesbitt* (2) and *Bristow* v. *Towers* (3). It is essential to distinguish carefully between these two cases—i.e., that where the cause of action is unexceptionable, but the plaintiff as an alien enemy is temporarily and personally incapable of being received as a plaintiff, and that where the cause of action, whoever puts it forward, fails in itself and fails finally. It cannot be put more clearly than in the words of Lord Ellenborough in *Flindt* v. *Waters* (1) where he says (15 East at p. 265):

> "The defence of alien enemy must be accommodated to the nature of the transaction out of which it arises; it may go to the contract itself on which the plaintiff sues and operate as a perpetual bar; or the objection may, as in a case of this sort, be merely personal in respect to the capacity of the party to sue upon it."

Where the cause of action is unexceptionable though the person interested is an enemy, as where the claim accrued before he became an enemy (as in *Flindt* v. *Waters* (1)), or where he was licensed by the Crown to trade (as in *Kensington* v. *Inglis* (4) and *De Tastet* v. *Taylor* (5)), there is no objection to an action being brought upon it for the benefit of the alien enemy by one who is not himself an alien enemy, provided of course he is otherwise entitled to sue in his own name. So where a subject of the realm or alien friend sues on bills of which he is holder, but as trustee for an alien enemy in respect of part of the proceeds, he can recover the whole: *Daubuz* v. *Morshead* (6). There is no incapacity in the plaintiff and no defence pleadable to the merits. If there is any objection it is at a later stage—namely, as to the payment over of the proceeds after the action by the plaintiff to the enemy. As Lord Ellenborough said (to refer once more to *Flindt* v. *Waters* (1)) and as Gibbs, C.J., said in *Daubuz* v. *Morshead* (6) the Crown might seize the money in the plaintiff's hands. It would indeed be wholly unreasonable, especially where the plaintiff is himself interested in part of the proceeds of the action, to let the defendant keep the money in hand, and the cases referred to show it is not the law. It is true that in *Brandon* v. *Nesbitt* (2) Lord Kenyon did say that an action would not lie "by or in favour of" an alien enemy, but after *Flindt* v. *Waters* (1) that cannot be taken as universally true. In the present case the plaintiff's claim, in which an alien enemy is interested, accrued before the war, and, so far as the common law rule goes, he is entitled to recover. I only wish to guard myself by pointing out that I say nothing as to what would be the position if an alien enemy, while such, put a subject of the realm in a position to sue for his benefit—e.g., by endorsing a bill to him merely for collection, or assigning a debt to him under the Supreme Court of Judicature Act, 1873. In such cases it might be said that the plaintiff's title failed as created by an illegal transaction with the enemy. But I say nothing about that.

It remains to consider the effect of the Trading with the Enemy Act, 1914, and the proclamation of Sept. 9, which makes it a criminal offence to make a payment to or for the benefit of an enemy. If payment of the debt now sued for, by the defendant to the plaintiff under the circumstances existing between the plaintiff and Arnz which I have already detailed, would be a payment for the benefit of the enemy within the meaning of the proclamation, I could not give a judgment which would have the effect of bringing about that payment. In my opinion, however, no crime is committed by making a payment to a third person which merely improves the position of an enemy by giving him further security that he

will ultimately recover the money, and without intention that the enemy, while such, shall benefit by it as a payment. In the present case the plaintiff expresses his willingness to submit to a stay of execution until he shall have taken out and brought to a hearing a summons under the Trading with the Enemy Amendment Act, 1914, for the vesting of this money in the custodian, and I shall make that order. I am by no means clear that even if the plaintiff had not consented it would not have been my duty to take the same course in order to make it quite certain that the judgment of the court would not work an offence against the statute. But it is unnecessary for me actually to decide that. I do not know whether upon the summons of the plaintiff the Chancery Division can or will make any order, or whether any or what other measures can or will be taken to prevent the money going to Arnz pending the war. My functions are confined to securing the necessary delay by suspending execution, as already mentioned.

Solicitors: *Biddle, Thorne, Welsford & Gait*; *Cohen, Dunn & Co.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

LEMY *v.* WATSON AND ANOTHER

[KING'S BENCH DIVISION (Lord Reading, C.J., Darling and Avory, JJ.), July 27, 28, 1915]

[Reported [1915] 3 K.B. 731; 84 L.J.K.B. 1999; 114 L.T. 140; 80 J.P. 17; 31 T.L.R. 612; 13 L.G.R. 1323; 25 Cox, C.C. 232]

Merchandise Marks—False trade description—Description applied before 1887—*Lawfully applied before* 1887—"*Lawfully and generally applied*"—*Merchandise Marks Act*, 1887 (50 *&* 51 *Vict.*, *c.* 28), *s.* 18.

By s. 18 of the Merchandise Marks Act, 1887: "Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied . . ."

"Generally" means that the description was in use before 1887 to the knowledge of the public and not merely to the knowledge of members of the trade.

"Lawfully" in this section means that where there has been a conventional trade description and the use of it has been lawful in the widest sense of the term, that is protected; the section is not restricted merely to requiring that there has been no infringement of the criminal law.

Per AVORY, J.: "Lawfully and generally applied to goods of a particular class to indicate the particular class" means a description which was applied in such circumstances at the time of the passing of the Act as was not calculated to mislead the public or the purchaser—a description which the purchasing public have come to recognise as being a description of goods the nature of which they perfectly well understand, e.g., a Bath bun although the bun was not made in Bath.

Notes. Referred to: *Re Concord Canning Co.'s Trade Mark* (1932), 49 R.P.C. 323.

As to the Merchandise Marks Acts, see 10 HALSBURY'S LAWS (3rd Edn.) 685–697; and for cases see 43 DIGEST 239 et seq. For the Merchandise Marks Act, 1887, see 25 HALSBURY'S STATUTES (2nd Edn.) 1113.

Case referred to:

(1) *R.* v. *Butcher* (1908), 99 L.T. 622; 72 J.P. 454; 24 T.L.R. 797; 52 Sol. Jo. 716; 21 Cox, C.C. 697; 1 Cr. App. Rep. 54, C.C.A.; 43 Digest 243, *868*.

Also referred to in argument:

Holmes v. *Pipers, Ltd.*, [1914] 1 K.B. 57; 83 L.J.K.B. 285; 109 L.T. 930; 78 J.P. 37; 30 T.L.R. 28; 12 L.G.R. 25; 23 Cox, C.C. 689, D.C.; 43 Digest 242, *865*.

Fowler v. *Cripps*, [1906] 1 K.B. 16; 75 L.J.K.B. 72; 93 L.T. 808; 70 J.P. 21; 54 W.R. 299; 22 T.L.R. 73; 50 Sol. Jo. 45; 4 L.G.R. 9; 21 Cox, C.C. 52, D.C.; 43 Digest 244, *875*.

Kirshenboim v. *Salmon and Gluckstein*, [1898] 2 Q.B. 19; 67 L.J.Q.B. 601; 78 L.T. 658; 62 J.P. 439; 46 W.R. 573; 14 T.L.R. 395; 42 Sol. Jo. 538; 19 Cox, C.C. 127, D.C.; 43 Digest 243, *872*.

Budd v. *Lucas*, [1891] 1 Q.B. 408; 60 L.J.M.C. 95; 64 L.T. 292; 55 J.P. 550; 39 W.R. 350; 7 T.L.R. 242; 17 Cox, C.C. 248, D.C.; 43 Digest 244, *876*.

Wood v. *Burgess* (1889), 24 Q.B.D. 162; 59 L.J.M.C. 11; 61 L.T. 593; 54 J.P. 325; 38 W.R. 331; 16 Cox, C.C. 729, D.C.; 43 Digest 240, *846*.

Gridley v. *Swinborne* (1888), 52 J.P. 791; 5 T.L.R. 71; 43 Digest 239, *845*.

Marshall v. *Ross* (1869), L.R. 8 Eq. 651; 39 L.J.Ch. 226; 21 L.T. 260; 17 W.R. 1086; 43 Digest 326, *1468*.

Special Case stated by the London quarter sessions.

The respondents were found guilty by a metropolitan magistrate of selling Norwegian brisling or sprats under a false trade description, namely, "sardines," contrary to the Merchandise Marks Act, 1887, s. 2 (1) (d). Quarter sessions held that the description "Norwegian sardine," while false in fact, was not false in law, and that in any case the respondents were entitled to be exonerated under s. 2 (2) of the Act as they had acted innocently.

Sir Robert Finlay, K.C. (*Kerly, K.C.*, and *Bodkin*, with him), for the appellant.

Walter, K.C. (*H. A. Colefax* and *H. Curtis Bennett*, with him), for the respondents.

LORD READING, C.J.—The respondents were summoned for having unlawfully sold goods to which they had applied a false trade description—namely, "sardines," and they were convicted after a long hearing before Sir John Dickinson, the chief magistrate. They appealed to the court of quarter sessions, and in the result the Court of Quarter Sessions differed from Sir John Dickinson and quashed the conviction, thus allowing the appeal. But they have stated a Case for the opinion of this court, and the points involved are no doubt of considerable importance, both to those engaged in this trade and to members of the public who purchase and consume sardines.

The case made by the appellants, representing the French society, is that a sardine is a small pilchard which is prepared in oil, packed in a tin in a way with which we are all familiar, and then sold in this tin as a tin containing sardines. The appellant says that the respondents have packed a fish known as brisling, which is the Norwegian name for a sprat, or, without being too precise, some fish like a sprat, which then is prepared in oil in a similar fashion to the preparation of sardines in France, packed in tins, and sent over to this country and sold under the trade description of "Norwegian Sardines." The appellant says that the respondents have no right to use the term "sardines" at all, and that they commit an offence by so doing. The respondents have contended before us, not that they are entitled to use the term "sardines" simpliciter—that they have not claimed—but that they are entitled to use the term "sardines" if accompanied by the local prefix, that is, "Norwegian"—their contention being that "Norwegian sardines" is a conventional term, a conventional description of the goods which they have been selling under this description, that this conventional description was in use and was applied before the Merchandise Marks Act, 1887, was passed, and conse-

quently, relying on s. 18 of that statute, that they have not committed any offence, but are justified in the use and application of the term "Norwegian sardines."

It is worthy of observation that in the lengthy and considered judgment of the court of quarter sessions, which we have before us, it is impossible to disentangle from that judgment a definite finding of fact that the term "Norwegian sardines" was generally applied as a trade description to these Norwegian brislings or sprats, prepared and packed as I have described, before the year 1887. There are undoubtedly in this judgment sentences, I might even say many sentences, which by themselves would lead to the conclusion that it was the intention of the court of quarter sessions so to find; but immediately one is confronted with many other sentences which indicate that they cannot possibly have intended to come to that conclusion. It appears to me, having considered this judgment both with the very able assistance of the learned counsel who have been before us and by studying it for myself, that the court of quarter sessions had halted at that finding. It was said that the description was false in fact but not false in law, and I understand the whole of the judgment, after the consideration that I have given to it, to mean this, that these Norwegian brislings or sprats so prepared and packed could not properly be described under the Merchandise Marks Act, 1887, as Norwegian sardines. They were not sardines in fact because they were not the small pilchard which really is the sardine proper, and even with the prefix "Norwegian" it was false in fact to say that these fish so prepared were Norwegian sardines. It is true they were Norwegian, but they were not sardines. That is what I understand the finding to be when it says that the description was false in fact. But then the court says that notwithstanding that the description was false in fact it is not false in law, and having regard to the observations of the deputy chairman, and also to the way the Case is stated, I come to the conclusion that what is meant is that but for s. 18 this would have been a false trade description, but because of s. 18 and of the facts and circumstances of the case it is not a false trade description. The question to my mind resolves itself really into whether or not it is established that either by the finding of fact, or from the facts as stated even though it may not be a definite finding of fact to that effect, the trade description applied was one which had been applied lawfully and generally to these goods or to indicate the particular method of manufacture of these goods.

Quarter sessions came to the conclusion that, although there had been a very small trade done before 1887, there was a trade which existed from 1884 or earlier in these Norwegian brisling, and that the fish so prepared and packed, as I have stated, were then sold as Norwegian sardines and described as Norwegian sardines, and it is contended that the court has found (and I think there is justification for saying that the court has intended to find) that that meant that the trade description had been applied generally to the goods of this class under s. 18. That, of course, would not be sufficient. It must be both lawfully and generally applied. I am not, however, satisfied that upon this evidence it was open to the court to come to the conclusion that the trade description was one that had been generally applied to these goods. It is worthy of notice that it is said that there had only been a very small trade, but what is left out of consideration altogether in the judgment of the quarter sessions, which, in my view, entitles me to differ from them in the conclusion of fact, is that they have not taken into consideration at all the members of the public—that is, the purchasers—but have dealt entirely with this case as if it were a matter for the trade only—that is, for sellers or manufacturers and dealers—as distinguished from the purchasers, who are the public.

It seems to me that the whole object of this statute was to protect the public against descriptions which might be given by the trade or members of the trade, which were false. But it is not sufficient to establish, as I will take it it was established in this case, that in the trade itself—that is, among the members who were carrying on the trade for a short time apparently before 1887—these

Norwegian sprats or brisling were described as "Norwegian sardines." One may well pause to inquire, why were they described as sardines? Obviously it appears to be clear from what has happened since this description was adopted that it is a term which at any rate lent itself to a very ready sale, and those in the trade preferred to call Norwegian sprats "Norwegian sardines," and they preferred to call them by that name because they got a better sale, and they got a better sale because people did not know that they were buying Norwegian sprats. That, in my view, is the true meaning of what has happened in this case, and the consequence of it is that the finding of fact by the quarter sessions is one which I find myself quite unable to accept, and I differ from it because I think that the court has wrongly directed itself in law upon this point. I agree with the view put forward by counsel for the appellant, which is founded on the observation of LORD ALVERSTONE, C.J., in *R.* v. *Butcher* (1), in which he says at the end of his judgment, in dealing with this very section—s. 18:

> "It was that evil to which the Act was directed. What it did was to say that those well-known conventional descriptions which had been applied to various classes of goods should be protected."

In an earlier part he had said:

> "What is intended to be protected under this section is a trade description, lawfully and generally applied to goods of a particular class or manufactured by a particular method to indicate the particular class or method of manufacture of such goods."

That is almost in terms stating the words of the statute. He gives it this meaning, that the object of that section was to protect the conventional description, such as "Brussels carpet," which is the instance given, and other secondary meanings which have grown up in the course of time, and of which instances have been given during the argument. I am quite satisfied that there cannot be a conventional description or secondary meaning unless those who were parties to it —that is, both sellers and purchasers—agree. There can be no conventional description which is made by the trade to which the public is not a party. There can, in my view, be no secondary meaning for the purposes of this section to which, again, the public is not a party. I come to the conclusion, therefore, that the court was wrong when it decided that this trade description had generally been applied before 1887.

I do not, however, rest my decision upon that alone. The court of quarter sessions also came to the conclusion that lawfully in s. 18 meant without committing a criminal offence, or without having committed or become liable for a criminal offence under the Act. In my judgment that is giving much too restricted a meaning to the word "lawfully." I do not think it was intended by the use of that term to say that if the conventional meaning is adopted and—provided that there has been no infringement of the criminal law—has been generally applied, then the trade description was to be protected. In my opinion, what was meant was that where there has been a conventional trade description and the use of it has been lawful in the widest sense of the term, that is protected, but the section is not restricted merely to requiring that there has been no infringement of the criminal law. That being, as it seems to me, the meaning of the section, I am satisfied again that the court of quarter sessions was wrong in its conclusion upon that point.

The Case is so stated that if we come to the conclusion that the court was wrong in its construction of s. 18, the appeal must be allowed and the conviction restored. From what I have said it follows not only from the way in which the Case is stated, but also from the way in which the case has been argued and presented before us, that the conclusion at which SIR JOHN DICKINSON arrived was the right one, and that the quarter sessions was wrong. For these reasons I think that this appeal must be allowed and the conviction restored.

DARLING, J.—I have come to the same conclusion, though I admit that my opinion wavered a good deal during the argument. The question, as it seems to me, is whether it is legitimate to offer for sale sprats caught and prepared in Norway in a manner which makes them look like what are commonly sold as sardines, and to sell them by the name of "Norwegian sardines." It could not possibly be right, and it would be an offence against the law concerning trade marks and trade descriptions to do this unless it has been rendered lawful by s. 18 of the Act of 1887. Section 18 says that no offence will be committed in regard to a trade description although that trade description may not be accurate, provided the description in question has been before 1887 lawfully and generally applied. With regard to the word "applied," upon consideration I do not think that can be limited, seeing that the word before it is "generally," to the application of the term by the person who puts the trade mark upon the goods nor to the person who takes the goods from the manufacturer with the trade mark—that is to say, I do not think it can be limited to people in the trade. The using of this inaccurate trade description will not be excused unless it was done before 1887 both lawfully and generally. With regard to the word "lawfully," I was impressed for some time by the argument of counsel for the respondents that "lawfully" meant not unlawfully in the criminal sense; but, having regard to all the matters with which this statute was dealing and with the other words used, I do not think we can give it that limited meaning. There are many things unlawful which are not merely forbidden by a criminal statute or by the common law as to criminal offences, and I think that a good instance is shown by the use of such a term where a person is charged that he did something "without lawful excuse." You could show that he had done the act without a lawful excuse, although you could not show that he had committed any criminal act or rendered himself liable to fine or imprisonment. I think that the word "lawfully" in this section is used in that sense, that he must show that he lawfully did it, that the word was lawfully applied, and that it was generally applied. I do not think that much question arises in the present case about the word "lawfully," because I think it is made much clearer that the term "Norwegian sardines" in this particular case cannot be said to have been "generally" applied. I have tried to think what "generally" here means, and there are cases already decided in this court which show that the description must have become a conventional term. It comes, therefore, to this. The term must be an erroneous one, otherwise the question does not arise —if it is an exact description the question cannot arise—it must be an erroneous term consecrated by common use. That is my notion of what would be a good definition of the expression "generally applied." There are many such terms, erroneous terms, consecrated by common use. One which has been mentioned in the course of the argument, a glaring instance, is the term "Bombay ducks," as applied to an Indian fish, and it is agreed that if anybody ordered Bombay ducks and somebody supplied him with ducks from Bombay, the contract to supply Bombay ducks would be broken and not fulfilled. Another obvious instance is eau de Cologne. Whatever that may be, it certainly is not water from the Rhine; and if eau de Cologne were ordered and one simply supplied a gallon of water from Cologne that would not fulfil the contract. Another instance where anybody would understand what was meant is if one speaks of Roman pearls. They are not pearls with which any oyster has had anything to do, nor do I know that they are Roman. They indicate something which is probably neither Roman nor a pearl, just as it was said by a well-known historian that the Holy Roman Empire had for its chief characteristics that it was neither holy, nor Roman, nor an empire. One other instance occurs to me of a term consecrated by common user, which does not indicate the true fact, and that is when people speak, as they commonly do, of the judicial ermine, meaning merely any white fur when worn by a judge. These have become conventional terms, and are, I think, instances of a trade description lawfully and generally applied, but I come to the conclusion that they are generally applied for this reason, that they are not limited, and that the words are not to be

applied merely as between those who produce the article and those who buy it for the purpose of retailing it to the public. I think that is what the statute means, and that "generally applied" in s. 18 must include all those who may buy the article or may possible buy it or talk about it. It must be a word adopted into the language in the same way as the words in the instances I have indicated are adopted into the language.

Therefore, seeing that there is no excuse for the selling of these things as Norwegian sardines unless the excuse can be found in s. 18 of the Merchandise Marks Act, 1887, I think that the decision of quarter sessions, which went upon a really different interpretation of the statute from that which I have indicated was the right one, was wrong and should be reversed.

AVORY, J.—I am of the same opinion. The respondents to this appeal were originally charged before the chief magistrate at Bow Street with the offence of selling goods to which the false trade description of "sardines" was applied, and the case appears to have proceeded before the chief magistrate upon these lines, that the description of "sardines" was falsely applied to these goods, and the chief magistrate decided the case upon that ground, and found as a fact that the trade description "sardine" was not at the passing of the Merchandise Marks Act, 1887, a trade description lawfully and generally applied to goods of a particular class.

Upon appeal to quarter sessions the respondents appear to have abandoned any contention that "sardines" could be lawfully applied as a trade description, and to have contended that they had not sold these goods under that trade description, but that they had sold them under the description of "Norwegian sardines." The appellant appears to have contested the case at quarter sessions on those lines, accepting the contest apparently on those lines as to whether these goods could properly be described as Norwegian sardines.

My own view, looking at the tin which has been produced before us, is that the respondents were liable to be convicted of selling these goods under the trade description of "sardines," and if the case had proceeded at quarter sessions upon that point alone, apparently they would have had no ground for upsetting the decision of the chief magistrate. But dealing with the case as it is presented to us now, whether the respondents were applying a false trade description to these goods in describing them as "Norwegian sardines," I have come clearly to the conclusion that the quarter sessions in this case were wrong in law in the construction which they put upon s. 18 of the Merchandise Marks Act, 1887. If there had been in this Special Case an express finding of fact by quarter sessions in the terms of s. 18 that the trade description "Norwegian sardines" was lawfully and generally applied to goods of a particular class to indicate the particular class in the year 1887, I doubt whether this court could have interfered, but I agree with what has been said by my Lord and my brother DARLING, that when one looks at this case, somewhat complicated as it is, it is impossible to say that there is any definite finding of fact in the terms of that s. 18. I think that quarter sessions were wrong in their view of the law, and I think that counsel for the respondents was wrong in his contention that the word "lawfully" in s. 18 means only something which is not contrary to the criminal law. My own impression is that the deputy chairman of quarter sessions went even further and construed it to mean anything which does not render the person doing it liable to be convicted of obtaining goods by false pretences. That appears to me to be the view which he really took of that word "lawfully." But in either view, in my opinion, it was wrong.

I will only add what I think is the true meaning of this expression "lawfully and generally applied to goods of a particular class . . . to indicate the particular class." In my view it means a description which is applied under such circumstances at that time, namely, in 1887, as was not calculated to mislead the public or the purchaser. I think that view is borne out by the latter part of the section because there is a proviso to this exception. Having excepted out of the operation of the

Act a trade description which is lawfully and generally applied to goods to indicate the particular class, the section provides that where such trade description includes the name of a place or country and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, then there must be added to the trade description the name of the place in which the goods were actually made or produced. That seems to me to show that the idea running through this section is that the description which is contemplated in the earlier part is one which is not calculated to mislead; in other words, a description which the purchasing public have come to recognise as being a description of goods the nature of which they perfectly well understand, such, for instance, as the case put during the argument of the Bath bun, where everybody in 1887 knew that it did not mean a bun that was made in Bath. Counsel for the respondents in supporting his contention was driven to say that traders who before 1887 had been in the habit of selling chicory as coffee, would be protected if they could show that it had been the habit generally among the traders to sell chicory as coffee. In my opinion this section was not intended to have any such effect; in other words, it was not intended to perpetuate error, or to protect dishonest trading. The very object of the whole statute was the contrary. For these reasons I agree that the judgment of the quarter sessions must be reversed and the conviction restored.

Appeal allowed.

Solicitors: *Halse, Trustram & Co.*; *Radford & Frankland*, for *Maugham & Hall*, Newcastle-on-Tyne.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

SAVILL *v.* DALTON

[COURT OF APPEAL (Lord Reading, C.J., Pickford, L.J., and Bray, J.), February 19, May 14, 1915]

[Reported [1915] 3 K.B. 174; 84 L.J.K.B. 1583; 113 L.T. 477; 59 Sol. Jo. 562; [1915] H.B.R. 154]

Bankruptcy—County court—Order by county court judge—Enforcement by action brought in High Court.

An order made by a county court in the exercise of its bankruptcy jurisdiction may be enforced by action in the High Court.

So **held** by LORD READING, C.J., and SWINFEN EADY, L.J., BRAY, J., dissenting.

Notes. Section 100 of the Bankruptcy Act, 1883, has been replaced in identical terms by s. 103 of the Bankruptcy Act, 1914. The earlier Bankruptcy Rules have been revoked and the present rules are to be found in the Bankruptcy Rules, 1952. R.S.C., Ord. 62, r. 24, is now replaced by R.S.C., Ord. 42, r. 24. A rule equivalent to Ord. 25, r. 2, of the County Court Rules, 1903, is not contained in the County Court Rules, 1936, but the relevant rules are stated expressly to be applicable to both orders and judgments.

As to the bankruptcy jurisdiction of county courts, see 2 HALSBURY'S LAWS (3rd Edn.) 253; and for cases see 4 DIGEST (Repl.) 41–43. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Berkeley* v. *Elderkin* (1853), 1 Ex.B. 805; 22 L.J.Q.B. 281; 21 L.T.O.S. 74; 17 J.P. 568; 17 Jur. 1153; 1 W.R. 305; 1 C.L.R. 416; 118 E.R. 638; 13 Digest (Repl.) 447, *704.*

(2) *Austin* v. *Mills* (1853), 9 Exch. 288; 23 L.J.Ex. 40; 22 L.T.O.S. 171; 18 J.P. 24; 18 Jur. 16; 2 W.R. 107; 2 C.L.R. 411; 156 E.R. 123; 13 Digest (Repl.) 440, *657*.

(3) *Furber* v. *Taylor*, [1900] 2 Q.B. 719; 69 L.J.Q.B. 898; 83 L.T. 308; 48 W.R. 689, C.A.; 13 Digest (Repl.) 463, *866*.

(4) *Godfrey* v. *George*, [1896] 1 Q.B. 48; 65 L.J.Q.B. 249; 44 W.R. 245; sub nom. *Godfrey* v. *G.*, 73 L.T. 599; 40 Sol. Jo. 117, C.A.; 30 Digest (Repl.) 199, *416*.

(5) *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q.B. 428; 68 L.J.Q.B. 801; 81 L.T. 206; 47 W.R. 577; 43 Sol. Jo. 602, C.A.; 30 Digest (Repl.) 199, *420*.

(6) *R.* v. *Northallerton County Court Judge*, [1898] 2 Q.B. 680; 68 L.J.Q.B. 24; 79 L.T. 327; 47 W.R. 68; 15 T.L.R. 9; 43 Sol. Jo. 10; 5 Mans. 300, C.A.; affirmed sub nom. *Skinner* v. *Northallerton County Court Judge*, [1899] A.C. 439; 68 L.J.Q.B. 896; 80 L.T. 814; 63 J.P. 756; 15 T.L.R. 433; 6 Mans. 274, H.L.; 4 Digest (Repl.) 41, *357*.

(7) *Re Pickard, Ex parte Official Receiver*, [1912] 1 K.B. 397; 81 L.J.K.B. 330; 105 L.T. 832; 56 Sol. Jo. 144; 19 Mans. 58, D.C.; 4 Digest (Repl.) 42, *360*.

(8) *Re Boyd, Ex parte McDermott*, [1895] 1 Q.B. 611; 64 L.J.Q.B. 439; 72 L.T. 348; 2 Mans. 166; 14 R. 364, C.A.; 4 Digest (Repl.) 97, *874*.

(9) *Grant* v. *Easton* (1883), 13 Q.B.D. 302; 53 L.J.Q.B. 68; 49 L.T. 645; 32 W.R. 239, C.A.; 11 Digest (Repl.) 527, *1402*.

Also referred to in argument:

The Delano, [1895] P. 40; 64 L.J.P. 8; 71 L.T. 544; 43 W.R. 65; 11 T.L.R. 23; 39 Sol. Jo. 42; 7 Asp.M.L.C. 523; 6 R. 810, C.A.; 1 Digest (Repl.) 273, *1730*.

Re A Bankruptcy Notice, Ex parte Official Receiver, [1895] 1 Q.B. 609; 64 L.J.Q.B. 429; 2 Mans. 164; 14 R. 362, C.A.; 4 Digest (Repl.) 97, *871*.

Norwich Corpn. v. *Norwich Electric Tramways Co., Ltd.*, [1906] 2 K.B. 119; 75 L.J.K.B. 636; 95 L.T. 12; 70 J.P. 401; 54 W.R. 572; 22 T.L.R. 553; 50 Sol. Jo. 499; 4 L.G.R. 1114, C.A.; 42 Digest 749, *1728*.

Re Chinery, Ex parte Chinery (1884), 12 Q.B.D. 342; 53 L.J.Ch. 662; 50 L.T. 342; 32 W.R. 469; 1 Morr. 31, C.A.; 4 Digest (Repl.) 11, *13*.

Norton v. *Gregory* (1895), 73 L.T. 10; 11 T.L.R. 439; 14 R. 735, C.A.; 30 Digest (Repl.) 199, *415*.

Seldon v. *Wilde*, [1911] 1 K.B. 701; 80 L.J.K.B. 282; 104 L.T. 194, C.A.; 30 Digest (Repl.) 199, *417*.

Re Barrett, Ex parte Reynolds (1885), 15 Q.B.D. 169; 54 L.J.Q.B. 354; 53 L.T. 448; 33 W.R. 715; 1 T.L.R. 433; 2 Morr. 147, C.A.; 4 Digest (Repl.) 12, *17*.

Appeal by the defendant from a decision of HORRIDGE, J., in an action brought by a trustee in bankruptcy.

A county court judge in the exercise of his bankruptcy jurisdiction made an order for an inquiry by the registrar as to the value of a bankrupt's property received by the defendant and for payment to the trustee in bankruptcy of the amount found due. The trustee brought an action in the High Court upon this order and HORRIDGE, J., gave judgment in his favour.

Newbolt, K.C., and *Tindale Davis* for the defendant.

Frank Mellor for the plaintiff.

Cur. adv. vult.

May 14, 1915. The following judgments were read.

LORD READING, C.J.—The plaintiff, the official receiver and trustee of the estate of a bankrupt, brought this action in the High Court upon an order made by the judge of the county court at Reading in the exercise of the jurisdiction in bankruptcy conferred upon the county court by the Bankruptcy Act, 1883. On

July 17, 1913, the county court judge made an order for an inquiry by the registrar as to the value of the bankrupt's property received by the defendant, as to the amount of the book debts collected by him, and for payment by the defendant to the official receiver of the amount found due upon the inquiry. The registrar held the inquiry and reported that a sum of £291 2s. 1d. was due after giving credit to the defendant for the amount paid by him. The sum of £291 2s. 1d. included £112 10s. reported by the registrar to be due by the defendant for depreciation of outstanding book debts. At the hearing of the action judgment was given for the amount claimed, £291 2s. 1d.

The defendant's appeal has been argued upon two grounds—namely (i) that no action is maintainable upon an order of the county court; (ii) that the order was bad on the face of it as to £112 10s., inasmuch as the registrar had no jurisdiction to report on the depreciation of the book debts. The first point depends upon the interpretation of the language of s. 100 of the Bankruptcy Act, 1883 [now s. 103 of the Bankruptcy Act, 1914.] There is no doubt that, apart from orders made by the county court judge in the exercise of bankruptcy jurisdiction, no action could be brought upon an order made by the judge in the county court. Before the Bankruptcy and Deeds of Arrangement Act, 1913, s. 16 (1) (now embodied in the Bankruptcy Act, 1914, s. 1 (1) (g)), a notice in bankruptcy could not be issued upon the order of the county court judge inasmuch as that order, even though final, was not a final judgment. In order to enforce the order of the county court judge the official receiver brought this action in the High Court to recover a final judgment for the sum found due by the defendant. On behalf of the defendant it is contended that no action could be brought upon the order. *Berkeley* v. *Elderkin* (1) and *Austin* v. *Mills* (2) decided that an action would not lie upon a judgment of the county court. In the later case of *Furber* v. *Taylor* (3) the Court of Appeal decided that an action would not lie upon an order of the county court. As was observed in that case, it was clear law prior to the Judicature Acts and the making of Ord. 62, r. 24, of the Rules of the Supreme Court that an action would not lie upon an order of a superior court as distinguished from a judgment; but that since the making of Ord. 62, r. 24, an action could be brought upon an order of a superior court, as this rule provides that every order of the court may be enforced in the same manner as a judgment to the same effect: see *Godfrey* v. *George* (4) and *Pritchett* v. *English and Colonial Syndicate* (5). The decision in *Furber* v. *Taylor* (3) was that, as there was no such rule in the county court, the action would still not lie on the order of a county court. Subsequently in 1903 a new county court rule, Ord. 25, r. 2, was passed, and it was contended that the effect of this rule is the same as that of Ord. 62, r. 24, of the Rules of the Supreme Court, and that consequently an action can now be brought upon the order of the county court judge. I cannot agree with this contention. The difference is that before the making of Ord. 62, r. 24, an action could be brought upon a judgment of the High Court, and by Ord. 62, r. 24, it can now be brought upon an order of the High Court. But the law that an action cannot be brought upon a judgment of the county court (*Berkeley* v. *Elderkin* (1)) has not been altered. It is still the law, and the effect of Ord. 25, r. 2, of the County Court Rules, 1903, is only to make an order enforceable as a judgment. As the authorities stand, apart from an order made in bankruptcy, no action will lie upon either an order or a judgment made in the county court.

That conclusion does not, however, decide the present case, as the order under consideration is an order made in bankruptcy. By s. 100 of the Bankruptcy Act, 1883, [now s. 103 of the Bankruptcy Act, 1914,]

> "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed."

This section confers upon the county court judge, when sitting in bankruptcy, not only all the ordinary powers of the county court, but also all the powers and the

jurisdiction of the High Court. The section makes the county court for this purpose a branch of the High Court sitting for the convenience of the public in a county court. The county court judge, when sitting in bankruptcy, is not limited to the exercise of the powers given to the county court judge in ordinary matters within his jurisdiction, but is invested for this purpose with all the powers of a High Court judge. I think this is the natural and ordinary meaning of the words of the section. In any event I read the judgment of the House of Lords in *Skinner* v. *Northallerton County Court Judge* (6) as a decision to this effect. LORD HALSBURY says ([1899] A.C. at p. 441):

> "In respect of bankruptcy the statute has given all the powers and jurisdiction which the High Court possesses to a county court sitting in bankruptcy . . . the statute itself has made the county court the High Court for this purpose."

In *Re Pickard, Ex parte Official Receiver* (7) PHILLIMORE, J., when considering the extent of the powers and jurisdiction of the judge of the county court sitting in bankruptcy to commit for contempt, was of opinion that the county court judge had the same power to enforce obedience of orders made by him in the bankruptcy jurisdiction of his court as a judge of the High Court. The order made could not be supported under the County Court Rules, but PHILLIMORE, J., nevertheless upheld the validity of the order on the ground that it complied with the Bankruptcy Rules regulating the mode in which the power of the High Court to commit should be exercised, and that the county court judge had all the powers of the High Court for this purpose.

By r. 93 of the Bankruptcy Rules, 1886, every order of the court may be enforced as if it were a judgment to the same effect. "The court" means the court having jurisdiction in bankruptcy (s. 168 of the Act of 1883 [now s. 167 of the Bankruptcy Act, 1914]). The object of this rule was to make all orders made by the court in bankruptcy as enforceable as judgments. The words of s. 100, "and the orders of the court may be enforced accordingly in manner prescribed," mean that the order of court, notwithstanding, that it is an order of the county court, shall be equivalent for the purpose of enforcement to an order of the High Court. By the statute the county court in bankruptcy can made orders as if it were the High Court, and when made these orders are to be enforceable to the same extent as orders of the High Court. In my view the legislature, when conferring upon the county court for the purpose of bankruptcy jurisdiction all the powers and jurisdiction of the High Court, meant also to give to orders of the county court the same degree of enforceability as appertains to orders of the High Court. The result, in my opinion, is that, as an action can be brought to enforce an order of the High Court, an action can be brought to enforce an order of the county court made in bankruptcy, and the first point taken by the defendant therefore fails.

I do not feel pressed by the practical difficulties which it is suggested may follow from this interpretation of the statute. The county court will continue to enforce its orders made in bankruptcy as they have hitherto been enforced. When necessary it can in addition enforce them as if it was the High Court enforcing a High Court order. The amount of the judgment must, however, be reduced by the sum of £112 10s. This sum represents the amount which the registrar found due as damages for depreciation of book debts which should have been collected by the defendant. The order of July 17, 1913, did not provide for any such inquiry or payment of any such amount. That order was limited to an inquiry by the registrar as to the value of the bankrupt's property recovered by the defendant and of the book debts collected by him, and to payment of the amount found due upon such inquiry. It was no part of the order that an inquiry should be made as to depreciation of the outstanding book debts which the defendant had failed to collect, or that payment should be made of any amount found due in respect of such depreciation. The result is that the registrar's report as to £112 10s. on the face of it travels beyond the order made by the county court judge for inquiry and payment, and cannot be supported. The judgment must be varied by reducing the

amount from £291 2s. 1d. to £178 12s. 1d., and to that extent the appeal must be allowed. As neither party has succeeded except in part there will be no order as to the costs of the appeal.

SWINFEN EADY, L.J.—The first question which arises upon this appeal is whether an action may be brought upon an order of a county court judge made in the exercise of his bankruptcy jurisdiction. It was conceded in argument, and indeed cannot be disputed, that, if an order be made by a registrar or judge of the High Court in the exercise of bankruptcy jurisdiction, an action may be brought upon the order in the same manner as it may be brought upon an order of the High Court made in the exercise of its ordinary jurisdiction; as to which see *Re Boyd, Ex parte McDermott* (8), where it was held by the Court of Appeal that a judgment obtained upon an interlocutory order for costs made in an action in the Queen's Bench Division is a final judgment for the purpose of founding upon it bankruptcy proceedings. An order of the High Court is not a judgment, but under Ord. 62, r. 24, every order of the court may be enforced in the same manner as a judgment. By the Bankruptcy Act, 1883, s. 100, [now s. 103 of the Bankruptcy Act, 1914.]

> "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed."

In my opinion the effect of this section is to make the orders of a county court in bankruptcy enforceable as the orders of a court having all the powers and jurisdiction both of the High Court and of the county court, otherwise the orders would not be enforceable "accordingly," but only as orders made in the exercise of the ordinary jurisdiction of the county court. It is also to be borne in mind that the orders are to be enforced "in manner prescribed," and the rules prescribe (r. 91) that it shall be the duty of the high bailiff of a county court to execute warrants and other process, and in the case of the High Court such officers or officer as the court may direct. By r. 93 of the Bankruptcy Rules, 1886, every order of "the court"—i.e., by s. 168 (1) of the Act of 1883, [now s. 167 of the Bankruptcy Act, 1914,] of the court having jurisdiction in bankruptcy under the Bankruptcy Act—may be enforced as if it were a judgment of the court to the same effect. As the county court has the same jurisdiction as the High Court for the purposes of bankruptcy, I see no ground for drawing any distinction between the force and effect or mode of enforcement of the orders made by them respectively, except so far as a different manner is or may be prescribed. *Re Pickard, Ex parte Official Receiver* (7) shows that the orders made by a county court judge exercising bankruptcy jurisdiction may be enforced in a manner not within the ordinary County Court Rules. Again, in *Skinner* v. *Northallerton County Court Judge* (6) both the Court of Appeal and the House of Lords pointed out that the Bankruptcy Act has made the county court the High Court for the purpose of bankruptcy jurisdiction, and a proceeding before it is to be treated as equivalent to, and as if it were, a proceeding before the High Court. By the Bankruptcy Act, 1914, s. 1 (1) (g), passed since this action has been pending, a bankruptcy notice may now be founded upon a final order as well as a final judgment, so it will in future no longer be necessary to bring an action upon a final order with a view to instituting proceedings in bankruptcy. In my judgment the present action is maintainable.

The second question raised by the appeal has reference to the amount for which judgment was given. On July 17, 1913, an order was made by the county court judge, in the exercise of his bankruptcy jurisdiction, that Sydney Dalton, the defendant herein, do pay to the official receiver the value of certain property of the bankrupt received by him, and the amount of book debts of the bankrupt collected by him, and by the same order an inquiry was directed to be made by one of the registrars of the court as to the value of the bankrupt's property received by the said Sydney Dalton, and as to the amount of the said book debts collected by him.

By the same order Sydney Dalton was ordered to pay to the official receiver within fourteen days after the date of the registrar's report the amount thereby found to be the value of the said property and the amount of the said book debts. By a report dated Aug. 7, 1913, the registrar found that there was due upon the footing of the said inquiry from Sydney Dalton to the official receiver the balance or sum of £291 2s. 1d. This balance, however, includes a sum of £112 10s., about which the question arises. An application was made by Sydney Dalton to the judge on Aug. 11 that the matter might be further considered by the registrar, but as on the further appointment before the registrar Sydney Dalton did not appear, and the registrar merely confirmed his previous report, nothing now turns upon this incident. The present action is by the official receiver and trustee to recover the said sum of £291 2s. 1d. found due by the report. In my opinion the judgment is erroneous as to £112 10s., part of the said sum of £291 2s. 1d. The sum of £112 10s. is not any part of the amount which by the order of July 17, 1913, the defendant was ordered to pay. It does not represent any property of the bankrupt received by him, or any book debts collected by him, beyond which the order to pay did not extend, but some alleged depreciation of book debts, not within the order of July 17, 1913, and not forming any part of the matter referred for inquiry to the registrar, and for which, so far as I can gather, the defendant is under no liability whatever. At all events, it is sufficient to say that it is not within the terms of the order, upon which alone the judgment is founded. The judgment under appeal must be varied by reducing the amount of it to £178 12s. 1d., that is, by allowing the appeal to the extent of £112 10s. As each party has partly succeeded and partly failed, there should be no order as to the costs of the appeal.

BRAY, J.—The questions for our decision are two: First, whether an action can be brought on an order of a county court judge exercising his bankruptcy jurisdiction. Second, whether the order of the county court judge on which the action was founded was bad on its face, and how far that constitutes a good defence.

The first question is one of considerable importance, and may be divided into two: Can an action be brought on an order or judgment of a county court judge exercising his ordinary jurisdiction? If not, can an action be brought when the order is one made by the judge when exercising his bankruptcy jurisdiction? As long ago as 1853 there were two decisions, one of the Court of Queen's Bench consisting of four judges, and one of the Court of Exchequer following it, that no action could be brought on a county court judgment. The main ground of the decision was this, that the Act of 9 & 10 Vict., c. 95, created a new court, and where new rights are given with specific remedies the remedy is confined to those specifically given: *Berkeley* v. *Elderkin* (1); *Austin* v. *Mills* (2). Since then there have been two further County Courts Acts, the Act of 1856 and the Act of 1888, but except by s. 49 of the Act of 1856 and s. 151 of the Act of 1888 there is no provision dealing with the matter. Section 49 of the Act of 1856 and s. 151 of the Act of 1888, which are in the same terms, provide for the removal by certiorari of a county court judgment into the High Court when the amount exceeds £20 and there are no goods of the debtor on which execution can be levied. At the end of each section are the words "but no action shall be brought upon such judgment." I think counsel for the defendant was right in his suggestion as to why the words were inserted. It was well known that no action could be brought on county court judgments, and the words were inserted to make it clear that the section did not give any such right when the case had been removed by certiorari into the High Court.

In *Furber* v. *Taylor* (3) it was decided that no action could be brought on an order of the county court, but it was pointed out by the court that there was no rule in the county court corresponding with Ord. 62, r. 24, in the High Court. In 1903 a new rule was made—see Ord. 25, r. 2, of the County Court Rules, 1903—to the same effect as Ord. 62, r. 24, and it was argued that the effect of the new rule was the same as that of Ord. 62, r. 24—namely, to allow an action to be brought on an order of the county court. The answer to that is that Ord. 62, r. 24, enabled an action

to be brought on an order of the High Court, because it provided:

> "Every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect";

and an action always could be brought on a judgment in the High Court; but that, as no action could be brought on a judgment in the county court, Ord. 25, r. 2, could not have that effect. It is impossible to suppose that it was intended that an action might be brought on a county court order, though it could not be brought on a county court judgment. The object of the rule was to extend Ord. 25, r. 1, which only allowed one means of enforcing an order—namely, that of s. 146—and to allow to an order all the other means of enforcing a judgment, as, for instance, garnishee proceedings or the appointment of a receiver. In *Furber* v. *Taylor* (3) the two decisions in 1853, to which I have before referred, were cited, but nothing was said by the court which suggested that they were not still good law. The reasons given in those decisions apply equally to the County Court Acts, 1888. There is no record of any action having been brought either on a county court judgment or on a county court order, and I have come to the clear conclusion that no such action can be brought.

If, then, no action can be brought on an order or judgment of the county court in its ordinary jurisdiction, can an action be brought on an order made in its bankruptcy jurisdiction? The most important section of the Bankruptcy Act, 1883, to be considered is s. 100 [now s. 103 of the Bankruptcy Act, 1914] (HIS LORDSHIP read the section, and continued.) I will deal with the earlier part of this section presently. It is the latter part which provides for the enforcement of bankruptcy orders in the county court. "Manner prescribed" means prescribed by the rules, and it is r. 93 that prescribes the manner of enforcement. It is in these words: "Every order of the court may be enforced as if it were a judgment of the court to the same effect." "The court" by s. 168 means "the court having jurisdiction in bankruptcy under this Act." Section 92 provides that the courts having jurisdiction in bankruptcy shall be the High Court and the county courts (save certain excluded county courts). Section 95 contains provisions as to the court in which the petition shall be presented—namely, in certain cases it is to be presented to the High Court, and in all other cases to the county court where the debtor resides or carries on business. Section 97 provides for transfers from one court to another. It is plain from these provisions that in any particular bankruptcy one court and one only (subject to transfer) has jurisdiction. This may be the High Court or any one of the county courts. If there is jurisdiction in one of the county courts there is none in the High Court unless and until a transfer is made. In this bankruptcy it was the Reading County Court and no other that had jurisdiction in bankruptcy. "The court," therefore, in this case was the Reading County Court. "May be enforced" must mean may only be enforced because no other manner is prescribed. It is not one of the ways in which an order may be enforced, but the way. "As if it were a judgment of the court to the same effect." "The court" must bear the same meaning as before, i.e., the Reading County Court, because that is the court having jurisdiction. It cannot mean the High Court, because that court has no jurisdiction in the matter. As there are, so far as I am aware, no judgments in bankruptcy, "a judgment of the court" means an ordinary judgment of the Reading County Court. If we apply r. 93, therefore, to the present case, it prescribes that the order in this case is to be enforced as if it were an ordinary judgment of the Reading County Court to the same effect. This is what one would expect. It is the court in which the order is made that should enforce it, and this court is to enforce it in the same way as it would enforce any order or judgment of its own to the same effect. Order 25 of the County Court Rules contains elaborate provisions as to the various modes of enforcing county court judgments, and the effect of r. 93 is that an order in bankruptcy made by any county court may be enforced in any of the ways provided by Ord. 25 of the County Court Rules. That

is the "manner prescribed" referred to in s. 100 of the Bankruptcy Act, 1883 [now s. 103 of the Bankruptcy Act, 1914]. A

So far, the answer to the question we have to decide seems to me fairly plain. Reliance, however, was placed on the word "accordingly." It is said that that means "as if it were an order of the High Court," or "with all the powers and jurisdiction of the High Court," and, therefore, that the county court judge has the same powers of and jurisdiction in enforcing orders as if he were a judge of the High B Court. If this be so, the section and rule together as applicable to this case would read thus: "And the order of the Reading County Court may be enforced as if it were an order of the High Court in manner prescribed, i.e., as if it were a judgment of the Reading County Court to the same effect." This seems to be an impossible construction. I think it is equally impossible to read the section as giving the county court judge the power of enforcing an order in both ways, i.e., in the same C manner as a High Court order or judgment and in the same manner as a county court order or judgment. The procedure in the two courts differs in several important particulars. The mode of execution on goods is quite different. In the High Court the solicitor of the execution creditor takes out a fi. fa. and directs the sheriff to proceed. In the county court the court keeps control of the process and directs the high bailiff. The sheriff pays the money he receives to the execution D creditor. The high bailiff pays it into court. It is impossible that the legislature could have intended that an order in bankruptcy could be enforced in both these ways or in either of them at the option of the execution creditor, and yet it must be so if every order is to be enforced as if it were a High Court order or judgment and also as if it were a judgment of the county court. Is the execution creditor who has obtained a bankruptcy order in the county court to be at liberty to issue E a fi. fa. directed to the sheriff of any county where the judgment debtor may have goods? Is the præcipe to be entitled in the county court or the High Court? May he apply in judge's chambers to a High Court judge or master, say, for the appointment of a receiver? What jurisdiction has a High Court judge or master in a proceeding which is in the county court? Is the judgment creditor to be at liberty to issue a writ of elegit, and, if so, will it be a proceeding in the High Court F or the county court? The county court cannot issue a writ of elegit, and there are no rules for regulating the procedure under such a writ. Surely this cannot be. Why should a county court order in bankruptcy be enforceable both as a county court judgment and a High Court judgment, and a High Court order in bankruptcy only as a judgment in the High Court? If this had been intended, would it not have been expressly so stated in the rule? whereas the rule contemplates that the G manner in which an order in bankruptcy is to be enforced depends upon the court which has jurisdiction in the matter. In my opinion the first part of s. 100 provides for the making of orders, and gives the county court judge all the powers and jurisdiction of the High Court to make orders, and the latter part of the section deals with enforcing orders, and the word "accordingly" may be read as "according to the terms thereof," or "so as to give effect to the powers and jurisdiction so H exercised"; but whatever it may mean it cannot, I think, mean as if it were an order or judgment of the High Court; and yet, unless it is so read, no action can be brought on such an order. It is to be observed further that it is not the powers and jurisdiction of the High Court than enable an order or judgment of the High Court to be enforced by action. The judge of the High Court can neither withhold I from (unless he stays execution) nor give to the judgment creditor the right to bring an action. The right arises from the supposed or implied contract between the parties that they will obey the judgment: see *Grant* v. *Easton* (9); a contract which does not exist in the case of the county court judgment, because the legislature, when it created the county courts, chose to confine the remedies to those specifically given: see *Berkeley* v. *Elderkin* (1).

I have, however, to deal with two authorities which were cited to us. The first case was *Re Pickard, Ex parte Official Receiver* (7). The headnote goes, I think,

too far. PHILLIMORE, J., decided the case on the ground that it was not a process by way of attachment, but a process by way of motion for contempt: see [1912] 1 K.B. at p. 402. He said, however (ibid. at p. 403):

> "I see no provision either in the Bankruptcy Acts or in the Bankruptcy Rules for the exercise of the power of attachment. But even if the order may be enforced by attachment it can none the less be enforced by committal."

His attention was not called to r. 93, and at most what he said was only a dictum. Rule 93 says that every order may be enforced as if it were a judgment of the county court, and attachment is one of the ways of enforcing a county court order: (see Ord. 25, r. 57). So that whatever may be the true construction of s. 100 of the Bankruptcy Act, [now s. 103 of the Bankruptcy Act, 1914,] I think that the court may enforce its order by warrant of attachment, though, as the court rightly decided, it may also punish for contempt of court under the express power given by s. 24 (4). Punishment for contempt of court is not enforcement of an order. It is punishment for disobedience. PHILLIMORE, J., says later that the court in the exercise of its ordinary jurisdiction has the power to attach. It seems to me that all that was necessary for the decision of that case and all that the learned judges really decided was that the county court judge had power to commit for contempt of court, and that process being different from a process by attachment Ord. 25, rr. 57–63, did not apply. BUCKNILL, J., decided the case on the same ground, saying that the bankrupt had been guilty of a contempt of court for having wilfully failed to comply with s. 24 (4) of the Bankruptcy Act, and might be punished accordingly. In my opinion this case does not assist the plaintiff. Nor in my opinion does *Skinner* v. *Northallerton County Court Judge* (6). That case decided that the county court judge had made the order in question under the jurisdiction given to him by the earlier part of s. 100, and consequently certiorari to quash it did not lie. No question arose as to the enforcement of an order or as to the construction of the latter part of s. 100 or r. 93, and my judgment depends upon what is the true construction of that rule which prescribes the manner in which county court orders in bankruptcy are to be enforced. I have made inquiries as to the practice with reference to the enforcement of the orders of the county court made in bankruptcy, and I understand that they are always enforced in the same way as ordinary county court judgments, and never as High Court judgments. It would revolutionise the whole practice if we were to hold that they were enforceable in the same manner as High Court orders, and, as far as I can see, without any advantage. Most of the orders are for small amounts, and all the reasons given by the judges in *Berkeley* v. *Elderkin* (1) are applicable. If a High Court action could be brought on every county court order in bankruptcy it would be most oppressive on the execution debtor. The option to the execution creditor to enforce it either as a High Court order or as a county court order would be equally oppressive.

In my opinion, this action fails and the appeal succeeds, and the proper order to be made would be that judgment should be entered in the action for the defendant with costs, but as the expense of the appeal has been wholly caused by the defendant not attending at the trial or raising the point there, I think he should pay the costs of this appeal. Holding this view, it becomes unnecessary for me to decide whether the plaintiff can recover the whole of the amount claimed, and I prefer not to express an opinion on this point. My doubt is whether, if this order is to be treated, contrary to the opinion I have expressed, for all purposes as a High Court judgment, the High Court can say that it is bad on the face of it or refuse to issue execution on it while it remains unreversed, and when in fact an application to set aside the findings of the registrar has failed.

Judgment varied.

Solicitors: *W. H. Martin & Co.*, for *F. A. Sarjeant*, Reading; *Edgar & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

Re WEDGWOOD. ALLEN *v.* WEDGWOOD

[Court of Appeal (Lord Cozens-Hardy, M.R., Kennedy and Swinfen Eady, L.JJ.), October 14, 15, 29, 1914]

[Reported [1915] 1 Ch. 113; 84 L.J.Ch. 107; 112 L.T. 66; 31 T.L.R. 43; 59 Sol. Jo. 73] B

Charity—Benefit to community—Protection and benefit of animals.

A testatrix left the capital and income of her residuary estate to W. absolutely subject to a secret trust that the money should be used at W.'s absolute discretion for the protection and benefit of animals.

Held: this was a valid charitable trust for a general public purpose beneficial to the community, as it tended to promote public morality by checking C the innate tendency to cruelty.

Re Cranston, Webb v. *Oldfield* (1) (1898), 1 I.R. 43, applied.

Notes. Explained and distinguished: *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R.Rep. 158. Considered: *National Anti-Vivisection Society* v. *I.R.Comrs.*, [1947] 2 All E.R. 217. Referred to: *Lord Nuffield* v. *I.R.Comrs.*, *Goodenough* v. *I.R.Comrs.* (1946), 175 L.T. 465; *Animal Defence and Anti-Vivisection Society* v. *I.R.Comrs.* (1950), 66 (pt. 2) T.L.R. 1091; *Baddeley* v. *I.R.Comrs.*, [1953] 2 All E.R. 233. D

As to trusts for the protection of animals, see 4 Halsbury's Laws (3rd Edn.) 230–231; and for cases see 8 Digest (Repl.) 348–349.

Cases referred to: E

(1) *Re Cranston, Webb* v. *Oldfield*, [1898] 1 I.R. 431; 8 Digest (Repl.) 352, **131.*

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(3) *London University* v. *Yarrow* (1857), 1 De G. & J. 72; 26 L.J.Ch. 430; 29 L.T.O.S. 172; 21 J.P. 596; 3 Jur.N.S. 421; 5 W.R. 543; 44 E.R. 649, L.C. & L.JJ.; 8 Digest (Repl.) 348, *285.* F

(4) *Tatham* v. *Drummond* (1864), 4 De G.J. & Sm. 484; 5 New Rep. 24; 34 L.J.Ch. 1; 11 L.T. 324; 10 Jur.N.S. 1087; 13 W.R. 61; 46 E.R. 1006, L.C.; 8 Digest (Repl.) 348, *286.*

(5) *Armstrong* v. *Reeves* (1890), 25 L.R.Ir. 325; 8 Digest (Repl.) 349, **126.* G

(6) *Re Nottage, Jones* v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370.*

(7) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(8) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) H 395, *879.*

(9) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 8 Digest (Repl.) 440, *1306.*

(10) *Re Foveaux, Cross* v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; I 13 R. 730; 8 Digest (Repl.) 348, *291.*

(11) *Marsh* v. *Means* (1857), 30 L.T.O.S. 89; 21 J.P. 725; 3 Jur.N.S. 790; 5 W.R. 815; 8 Digest (Repl.) 421, *1117.*

(12) *Re Vallance* (1876), 2 Seton's Judgments, 7th Edn., 1304; 8 Digest (Repl.) 348, *287.*

Also referred to in argument:

Re Douglas, Obert v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 348, *290.*

A *A.-G.* v. *Whorwood* (1750), 1 Ves. Sen. 534; 27 E.R. 1188, L.C.; 8 Digest (Repl.) 504, *2245.*

Re Joy, Purday v. *Johnson* (1888), 60 L.T. 175; 5 T.L.R. 117; 8 Digest (Repl.) 414, *1072.*

Appeal from a decision of WARRINGTON, J.

B By her will, dated June 26, 1913, Frances Julia Wedgwood, who died on Nov. 26, 1913, appointed Judge Wilfred Baugh Allen and Cecil Wedgwood to be her executors and trustees, and devised and bequeathed all the residue of her real and personal estate upon trusts for conversion, and upon further trust (subject to the payment of certain sums and the setting aside of other sums to secure certain annuities) for Cecil Wedgwood absolutely. The testatrix had expressed a wish C to Cecil Wedgwood that he would apply the residue for the protection and benefit of animals and he agreed to do so. She said she had been advised that it would be difficult to draft a trust giving him the latitude that she desired, and that the best method of carrying out her wishes would be to leave the residue to Cecil Wedgwood absolutely. An originating summons was taken out by Judge Wilfred Baugh Allen to which Cecil Wedgwood and one of the next-of-kin were made D defendants asking for the determination of the following questions and for the following relief: (i) Whether under the circumstances the gift in the will contained of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood was an absolute gift to him beneficially or was subject to any secret trust. (ii) If the gift was subject to any secret trust, whether such trust was a good and valid charitable trust or not; and, if not a good and valid charitable E trust, whether such secret trust was validly created or was too vague and uncertain and had consequently failed for uncertainty. (iii) That directions might be given to the plaintiff and the defendant Cecil Wedgwood as executors of the will as to how they should dispose of the residuary estate. (iv) That if and so far as necessary the real and personal estate of the testatrix might be administered by the court. The summons was adjourned into court and came on to be heard F before WARRINGTON, J., on April 1, 1914. It appeared from the evidence of the defendant, Cecil Wedgwood, that in 1908 the testatrix had asked him to act as executor and trustee together with the plaintiff, Wilfred Baugh Allen, and that she wished him to undertake a further trust which was to apply the residue of her estate for the protection and benefit of animals. Subsequently she said she would leave him the residue absolutely and wished him to have a free hand to use it for G the benefit of animals as circumstances might arise. He suggested he might help forward the movement for the humane slaughtering of animals and the movement to provide municipal abattoirs and she agreed that those were the sort of purposes she would like to have forwarded, and that he was to expend either income or capital. She wished him to have an absolutely free hand, trusting in his judgment and honour.

H WARRINGTON, J., nevertheless made a declaration that upon the true construction of the will and in the events which had happened, the gift in the will contained of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood was an absolute gift to him beneficially and was not subject to any secret trust. His Lordship did not, therefore, decide the other questions which were asked by the summons, as they did not arise having regard to his I decision on the first question. From that decision the defendant Bertram H. Wedgwood appealed, asking by his notice of appeal that it might be declared that upon the true construction of the will and in the events which had happened, the gift was subject to a secret trust, and that such secret trust was not a good or valid charitable trust but was void for perpetuity and/or uncertainty, and had failed accordingly. There was a cross-appeal by the Attorney-General that he intended to contend that the order of WARRINGTON, J., should be discharged or varied, and that in lieu thereof it should be declared that upon the true construction of the will and in the events which had happened the gift was subject to a

secret trust, and that such secret trust was a good and valid trust for charitable purposes; and that all necessary and proper directions should be given for the purposes of carrying out such trust into effect, or that such further or other order should be made in the premises as to the court might seem fit.

Henry Terrell, K.C., and *W. H. Salter* for the defendant.
Clauson, K.C., and *J. E. Harman* for the plaintiff.
Austen-Cartmell for the Attorney-General.

The court came to the conclusion that the evidence showed that the bequest was not an absolute gift to the defendant, but was subject to a secret trust, and reserved judgment on the question whether a valid charitable trust had been created.

Cur. adv. vult.

Oct. 29, 1914. The following judgments were read.

LORD COZENS-HARDY, M.R.—It having been decided that Cecil Wedgwood takes the residuary estate not beneficially but upon a secret trust, it remains to consider what is the trust and whether it is charitable. The terms of the trust are "for the protection of animals" or "for the protection and benefit of animals." The movement for the humane slaughtering of animals and the provision of municipal abattoirs were mentioned as the sort of purpose the testatrix would like to have forwarded.

The word "charity" has a much wider meaning in law than it has in popular speech. The courts have held that the particular objects mentioned in the Statute of Elizabeth (43 Eliz., c. 4)—viz.: (i) Relief of the poor; (ii) Religion; (iii) Education; are not exhaustive. By analogy a large class of other objects has been included. LORD MACNAGHTEN'S judgment in *Income Tax Special Purposes Comrs. v. Pemsel* (2) is perhaps the leading authority. But I am content to adopt what was said by FITZGIBBON, L.J., in *Re Cranston, Webb v. Oldfield* (1) ([1898] 1 I.R. at p. 446):

> "Any gift which proceeds from a philanthropic or benevolent motive and which is intended to benefit an appreciably important class of our fellow creatures, including animals, and which will confer the supposed benefit without contravening law or morals, will be charitable."

It may be, and indeed I think it is, true that there has been a tendency to enlarge the meaning of the word "charity," and that gifts have within the last fifty years been supported as good charitable gifts which 150 years ago would not have been supported. The authorities are very numerous. I need refer to only a few. In *London University v. Yarrow* (3) it was held that a trust for the benefit of animals useful to man was good, and there was a clear intimation of opinion that the limitation to domestic animals was not necessary. In *Tatham v. Drummond* (4) the establishment of a slaughter-house for horses was held to be charitable, though the gift failed as it involved the purchase of land. The Society for the Prevention of Cruelty to Animals, the Society for the Abolition of Vivisection, and a Home for Lost Dogs are instances in which the doctrine has been extended.

In my opinion, it is not possible for us to hold that this trust for the protection of animals is not a good charitable purpose. Apart from authorities which are binding upon us, I should be prepared to support the trust on the ground that it tends to promote public morality by checking the innate tendency to cruelty. In the language of HOLMES, L.J., in *Re Cranston, Webb v. Oldfield* (1) ([1898] 1 I.R. at p. 457):

> "Gifts, the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation, are charitable. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty."

I desire also to mention the judgment of Chatterton, V.C., in *Armstrong* v. *Reeves* (5), especially the passage (25 L.R.Ir. at p. 341) where he points out that objects of general mercy to animals of all kinds, whether useful to man or not, are charitable.

There must be a declaration that the trust in the terms which I have mentioned is a good charitable trust. The selection of the particular mode of applying the fund, both principal and income, will rest with Mr. Cecil Wedgwood during his life. The costs of all parties of this appeal must be provided for out of the residue, as in the court below.

KENNEDY, L.J.—In this case the court has already pronounced its decision that the bequest of the residuary real and personal estate of the testatrix to the defendant Cecil Wedgwood, constituted not an absolute gift to him beneficially, but was subject to a secret trust. The question reserved for further consideration was whether or not such trust was a good and valid charitable trust. It is a trust for the protection and benefit of animals. We know from the evidence that two objects which, in the opinion of the testatrix, would come within the purview of her generosity were the more humane slaughtering of animals and the establishment of municipal abattoirs. It was contended by counsel for the defendant on behalf of the next-of-kin that this is too wide, too vague and too uncertain.

A review of the relevant authorities shows, I think, that during the past century there has been a growing tendency to enlarge the area of purposes which will be treated by courts of equity as charitable purposes, whilst still in theory only those objects of general public utility are charitable, in the legal sense of the term, which either are included in or are analogous to the objects mentioned in the preamble of the 43 Eliz., c. 4: see especially the judgment on this point of Rigby, L.J., in *Re Nottage, Jones* v. *Palmer* (6). In the course of his judgment in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2) ([1891] A.C. 531 at p. 583) Lord Macnaghten took from the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham* (7) (10 Ves. 522 at p. 532) a classification of the objects within which all charity to be administered in the Court of Chancery must fall into four divisions—i.e., trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Sir Samuel Romilly, as Lindley, L.J., points out in *Re Macduff, Macduff* v. *Macduff* (8), rightly described the fourth division within which counsel for the Attorney-General argues that this trust falls, as the most difficult. Holmes, L.J., in the Irish case of *Re Cranston, Webb* v. *Oldfield* (1) ([1898] 1 I.R. at p. 452) said:

> "I don't know a better classification, and yet it is obvious that the fourth head is altogether vague and indeterminate."

Fitzgibbon, L.J., in the same case, said:

> "The essential attributes of a legal charity are, in my opinion, that it should be unselfish—that is, for the benefit of other persons than the donor; that it shall be public—that is, that those to be benefited shall form a class worthy in numbers or importance of consideration as a public object of generosity; and that it shall be philanthropic or benevolent—that is, dictated by a desire—to do good."

In *Goodman* v. *Saltash Corpn.* (9) Lord Cairns, in the course of his speech, speaking of a condition that the free inhabitants of ancient tenements in the borough of Saltash should have a right of dredging for oysters in the estuary, said that such a condition would create that which in the very wide language of our courts is called a charitable—that is to say, a public—trust or interest for the benefit of the free inhabitants of ancient tenements. Chitty, J., in *Re Foveaux, Cross* v. *London Anti-Vivisection Society* (10) said ([1895] 2 Ch. at p. 504):

> "To be a charity there must be some public purpose—something tending to the benefit of the community,"

and he adds a little later in his judgment: A

"In examining the purposes of any particular trust the court has taken a liberal rather than a narrow view of the subject."

The Master of the Rolls in Ireland in 1898, in *Re Cranston, Webb* v. *Oldfield* (1) ([1898] 1 I.R. at p. 435) said: B

"We have gone much further than the words of the statute [the first Irish Poor Law Act of Elizabeth I] and the tendency of late years has been, where a testator dedicates part of his property towards an object which is not illegal in itself, to give effect to the intention unless there is some coercive reason to the contrary."

It would be easy to cite cases illustrating this attitude of liberality; but, turning C now to the decisions on gifts expressed to be, in one way or another, for the benefit of animals, which are the decisions particularly pertinent to the consideration of the question before us, we find, I think, sufficient authority for maintaining, as I hold that we ought to maintain, the validity of the gift, general as its terms are in the present case. The earlier cases, of which there are several, are cited in the arguments of counsel, and in the judgment of CHITTY, J., in *Re Foveaux, Cross* v. D *London Anti-Vivisection Society* (10), to which I have already referred, and it is unnecessary to refer to them at length. It is, however, I think, having regard to the argument addressed to us by counsel for the defendant, material and right to note that the validity of the gift as a charitable gift has not been affirmed only in cases in which the animals for whose benefit the gift was bequeathed were domestic animals or animals useful to man. Gifts to the Royal Society for the Prevention E of Cruelty to Animals, and to the Society for the Protection of Animals liable to Vivisection, have been held good charitable gifts, and in neither case are the purposes of the named society limited to useful or domestic animals.

In *Marsh* v. *Means* (11) and in *Re Vallance* (12), both of which are referred to by CHITTY, J., the object appears to have been the prevention of cruelty to animals generally. Towards the close of his judgment he adds ([1895] 2 Ch. at p. 507): F

"Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men."

In the Irish case of *Armstrong* v. *Reeves* (5), CHATTERTON, V.-C., in the course of G his judgment said in reference to cruelty to animals (25 L.R.Ir. at p. 341):

"In my opinion it is for the benefit of the public that such cruelty should be prevented, and that any society for the prevention of cruelty to animals, whether domestic animals or not, is within the scope of charitable institutions."

In *Re Cranston, Webb* v. *Oldfield* (1), to which I have referred, HOLMES, L.J., H used very similar language ([1898] 1 I.R. at p. 457):

"There is really no difference amongst thoughtful and civilised men on this subject. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty." I

It was contended in the argument addressed to us against the validity of this particular bequest as a charitable gift that it fails on account of such vagueness and generality of expression as would justify its application by the trustee to the protection and maintenance of noxious animals, and he instanced, if I remember rightly, lions and tigers. Now, it is quite true, as laid down by LINDLEY, L.J., in *Re Macduff, Macduff* v. *Macduff* (8) ([1896] 2 Ch. at pp. 463, 464), that when we are dealing with general words we must consider whether there is such an indica-

tion of purpose or of trust that the court, if called upon to execute it, can see what it has to do—can see the limits of its own powers. But, at the same time, I can entertain no doubt that if the court should now be asked to say whether the trustee under this bequest for the protection and benefit of animals was fulfilling his duty in expending the fund upon the preservation of beasts of prey or mad dogs, the court would not find any difficulty as to the answer which is dictated by reason and common sense. There are, I suppose, very few, if any, charities of a wide character, such as to take an imaginary case, a charity for the relief of poor mechanics, in regard to which it would not be easy for ingenuity to suggest difficulties of discrimination. In my opinion, the secret trust contained in the will of Miss Wedgwood is a valid charitable trust.

SWINFEN EADY, L.J.—It has already been decided that Mr. Cecil Wedgwood does not take the residue beneficially, but that it is subject to a secret trust. There remains the question whether it has been validly given upon trust, or whether the next-of-kin have become entitled. The trust was to apply the residue "for the protection of animals" or for the "protection and benefit of animals," the testatrix having assented to the suggestion that the movement for the humane slaughtering of animals, and the movement for providing municipal abattoirs in the place of ordinary slaughter-houses were the sort of purposes, among others, which she would like to be supported. The object of the trust being thus ascertained and defined the question arises, is this a valid charitable trust? In my opinion it is. It is a gift for a general public purpose, beneficial to the community. A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals; and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race. That such purposes are eminently charitable, in the accepted legal sense of that term, is amply established by the cases to which the Master of the Rolls has referred.

In *Re Foveaux*, *Cross* v. *Anti-Vivisection Society* (10) CHITTY, J., decided that certain societies for the suppression and abolition of vivisection were charities within the legal definition of the term "charity." He said ([1895] 2 Ch. at p. 507):

> "Cruelty is degrading to man, and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit humanity."

Those observations, in which I entirely concur, equally apply to the trust constituted by the testatrix in the present case, which in my opinion is a valid charitable trust.

LORD COZENS-HARDY, M.R.—The form of order that is proposed on behalf of the Attorney-General has been handed to me and I will read it: "Discharge the order of WARRINGTON, J., in so far as it declares that upon the true construction of the will of the above-named testatrix Frances Julia Wedgwood and in the events which have happened the gift in the said will contained of the residuary real and personal estate of the said testatrix to the defendant Cecil Wedgwood was an absolute gift to him beneficially and was not subject to any secret trust." That is right, of course. Then: "And in lieu therefore declare that the said gift was not an absolute gift to the defendant Cecil Wedgwood beneficially, but was subject to the trust for the application thereof as to both capital and income for the protection and benefit of animals in such manner as he shall think fit, and that such trust is a good and valid trust for a public and charitable purpose"—that is right. Then: "And the Attorney-General not at present asking for a scheme or for the administration of the said testatrix's estate, and the defendant Cecil Wedg-

wood by his counsel undertaking to furnish proper accounts of the said testatrix's estate to the Attorney-General, and to render to the Attorney-General an annual account and statement of the application of the trust fund and the income thereof, liberty to the Attorney-General to apply for administration or otherwise."

Appeal allowed.

Solicitors: *Waterhouse & Co.*; *Treasury Solicitor.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

JUREIDINI *v.* NATIONAL BRITISH AND IRISH MILLERS' INSURANCE CO., LTD.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor), July 20, 21, December 14, 15, 1914.]

[Reported [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205]

Arbitration—Award condition precedent to right of action—Action brought without reference to arbitration—Defence—Repudiation going to substance of contract.

Insurance—Arbitration clause in policy—Action on policy without reference to arbitration—Defence that claim fraudulent.

By cl. 12 of an insurance policy it was provided that, if a claim should be fraudulent or the loss or damage should be caused by the wilful act or with the connivance of the insured, all benefit under the policy should be forfeited. By cl. 17 of the policy it was further provided that, if any difference arose as to the amount of loss or damage, the dispute was to be submitted to arbitration and it was a condition precedent to any right of action or suit upon the policy that an award by an arbitrator as to the amount of the loss or damage should be obtained first. The appellant insured his stock in trade against loss by fire with the respondents, the policy of insurance including the above clauses. The appellant having made a claim under the policy for loss caused by a fire, the respondents alleged that the loss was caused by the felonious acts of the appellant and that the claim was fraudulent. The appellant brought this action upon the policy and the respondents contended that the condition as to arbitration had to be fulfilled before an action could be brought.

Held: in view of cl. 12 of the policy, the allegation that the claim was fraudulent, if made out, went to the very root of the matter; when there was a repudiation which went to the substance of the whole contract, the person setting up that defence was not entitled to insist on a subordinate term of the contract being enforced; and, therefore, the appellant's action was competent although the dispute had not been referred to arbitration.

Scott v. *Avery* (1) (1856) 5 H.L.Cas. 811 distinguished.

Notes. Distinguished: *Woodall* v. *Pearl Assurance*, [1918–19] All E.R.Rep. 544; *Macaura* v. *Northern Assurance Co., Ltd.*, [1925] A.C. 619; *Freshwater* v. *Western Australian Insurance Co.*, [1932] All E.R.Rep. 791; *Stevens & Sons* v. *Timber and General Accident Insurance Association, Ltd.*, [1933] All E.R.Rep. 806; *Toller* v. *Law Accident Insurance Society, Ltd.*, [1936] 2 All E.R. 952; *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337. Referred to: *Wall* v. *Rederiaktiebolaget Luggude*, [1915] 3 K.B. 66; *Sanderson* v. *Armour* (1922), 91 L.J.P.C. 167; *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] All E.R.Rep. 51; *Jones* v.

A *Birch Bros., Ltd.*, [1933] All E.R.Rep. 251; *Locker and Woolf, Ltd.* v. *Western Australian Insurance Co.* (1935), 79 Sol. Jo. 574.

As to arbitration as a condition precedent, see 22 HALSBURY'S LAWS (3rd Edn.) 257–258, and ibid. vol. 2, 17–21; and for cases see 2 DIGEST (Repl.) 443 et seq.

Cases referred to:

B (1) *Scott* v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, *290.*

(2) *Caledonian Insurance Co.* v. *Gilmour*, [1893] A.C. 85; 57 J.P. 228; 9 T.L.R. 146; 1 R. 110, H.L.; 2 Digest (Repl.) 473, *332.*

Also referred to in argument:

C *London and North Western and Great Western Joint Rail. Cos.* v. *Billington, Ltd.*, [1899] A.C. 79; 68 L.J.Q.B. 162; 79 L.T. 503; 15 T.L.R. 97 H.L.; 8 Digest (Repl.) 239, *1529.*

O'Connor v. *Norwich Union Life and Fire Insurance Society*, [1894] 2 I.R. 723; 28 I.L.T. 95; 2 Digest (Repl.) 493, **336.*

Trainor v. *Phœnix Fire Assurance Co.* (1891), 65 L.T. 825; 8 T.L.R. 37; 2 Digest (Repl.) 471, *321.*

D *Johannesburg Municipal Council* v. *Stewart & Co.*, [1909] S.C. 860; reversed, [1909] W.R. 161; 2 Digest (Repl.) 448, **149.*

Appeal by the assured from a decision of the Court of Appeal setting aside a judgment of DARLING, J., sitting with a special jury by which judgment was entered for the appellant for £543 2s. upon two policies of insurance issued by the E respondents. The policies contained, inter alia, the following clauses:

"(12) If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy; or if the loss or damage be occasioned by the wilful act, or with F the connivance of the insured; or if the insured or anyone acting on his behalf shall hinder or obstruct the company in doing any of the acts referred to in condition 11; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition 17 of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their G award, all benefit under this policy shall be forfeited."

"(17) If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of H the parties within two calendar months after having been required to do so in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators, the difference shall be referred to the decision of an umpire who shall have been appointed I by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators, or umpire respectively; and in the event of the death of an arbitrator or umpire another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The cost of the reference and the award shall be in the discretion of the arbitrator, arbitrators, or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action

or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained."

The Court of Appeal (VAUGHAN WILLIAMS, FARRELL and KENNEDY, L.JJ.) set aside the judgment on the ground that no action was maintainable until there had been an arbitration to assess the amount of the damage.

Gordon Hewart, K.C., Sylvain Mayer, K.C., and *Owen Evans* for the appellants. *J. B. Matthews, K.C., Holman Gregory, K.C.*, and *P. B. Durnford* for the respondents.

The House took time for consideration.

Dec. 15, 1914. The following opinions were read.

VISCOUNT HALDANE, L.C.—I believe your Lordships are unanimously of opinion that this case ought to be disposed of upon the preliminary point.

Shortly described, the nature of the case was this. The appellants, who were plaintiffs in the action in the court below, took out various policies of insurance with insurance companies, of whom the respondents were one, and it has been agreed that as these policies were substantially in the same form, the present action should be taken as a test action and should dispose of them. The insurance was over property at Costa Rica, and the form of the policy was a policy over stock of textiles and hardware and other non-hazardous merchandise the property of the insured on the premises of a certain store at a certain place in Port Limon, in Costa Rica, and the insurance under the particular policy sued on, the policy which was taken as the test case, was for £800. Then there were certain conditions, and two of them are of importance. Condition 12 I will read. It is in these terms:

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured"

—I need not read certain further conditions which follow, but the consequence at the end of this clause is that all benefit under this policy shall be forfeited in the cases I have described and in the other cases. Then cl. 17 of the policy says that if any difference arises as to the amount of loss or damage, the difference is to be submitted to arbitration, and it is

"expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage, if disputed, shall be first obtained."

What happened was this. There was a loss occasioned by fire at Port Limon and the appellants made a claim under the policy, and the respondents took up the ground that the loss was caused by the felonious acts of the appellants. They charged them with arson, and said that the claim was a fraudulent one. That was obviously a case which, if made out, went to the very root of the matter, because cl. 12 of the policy, which I have read, says that if the claim be a fraudulent one and damage be occasioned by any wilful act, then all benefit under the policy is to be forfeited, and that attitude was again taken up by the respondents, because when the action was brought by the appellants on which this appeal arises, the respondents in their defence took this ground, and maintained that the appellants were not entitled to claim under the policy.

No doubt it is true that the policy contained an arbitration clause with a very stringent addition to it to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all, and if an action had been brought upon a policy containing such a clause and no more had happened, then, on principle and on authority, the claim could not have been maintained without

A fulfilling the condition precedent, because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, if necessary, by an arbitrator, and *Scott* v. *Avery* (1) is a decision of this House to the effect that that is the law. But in *Scott* v. *Avery* (1) the action was brought upon a contract containing such a clause, and to the B declaration a plea was put in raising this term of the contract, that the action could not be maintained because the plaintiff had contracted he should have no cause of action unless there had been a previous arbitration, and that the plea was demurred to, and this House ultimately decided, after consulting the judges, who differed very much in opinion (the decision was a final decision), that the demurrer was not a good demurrer, that the plea was a good one, and that the C action could not be maintained. That was, in effect, a decision upon a demurrer. But the present case, as I have already pointed out, is different. There has been in the proceedings throughout a repudiation on the part of the defendants of liability based upon charges of fraud and arson, the effect of which is that the right to all benefit under the policy is forfeited, but one of the benefits is the right to go to arbitration under this contract and to establish your claim in the D way which may to some people seem preferable to proceedings in the courts, and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract. Speaking for myself, when there is repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced. As I have said, E this is not a case like *Scott* v. *Avery* (1). It is a case in which the consequences with which we are dealing arise from the fact of the repudiation. When the case went to trial, it was heard before DARLING, J., and a special jury, and the jury found that the case of fraud and arson had broken down and found for the plaintiffs upon those issues, and the learned judge gave judgment, not that the case should go to arbitration, but for £3,000, and I think that that was probably F right, the arbitration clause having gone with the repudiation. The respondents appealed to the Court of Appeal on two grounds: first that the arbitration clause was a bar to the action; and, secondly, for a new trial on the ground that the verdict was against the weight of evidence, and also on the ground there was further evidence which ought to be taken into account. The second ground was sought to be made good on a notice of motion which I gather was out of G time, but which under the special circumstances it was hoped the Court of Appeal would none the less give leave to entertain.

The Court of Appeal has never disposed of the motion for a new trial on either of the grounds which I have indicated. It has only disposed of the case on the footing that the arbitration clause is a bar, a conclusion which, for the reasons I have already indicated, I am unable to concur in. I am therefore of opinion H that the judgment of the court below, the Court of Appeal, must be reversed, and that this case should go back to be disposed of by the Court of Appeal on the motion for a new trial, and I think that the most convenient form in which to put our judgment will be this: To restore the judgment of DARLING, J., without prejudice to any application that the respondents may make to the Court of Appeal with a view to restoring and disposing of the notice of appeal which relates to I the new trial, and that the judgment of DARLING, J., should be stayed for a month with a view to such application. I am of opinion also that the respondents should pay the costs here and I think in the Court of Appeal also, and I move your Lordships accordingly.

LORD DUNEDIN.—I concur. I certainly have not got the slightest idea that in pronouncing the judgment we are about to give we are in the faintest way throwing any doubt upon the decision of this House in the case of *Scott* v. *Avery* (1). That decision in *Scott* v. *Avery* (1) was again upheld by the House in a

more recent case of *Caledonian Insurance Co.* v. *Gilmour* (2), where the Lord Chancellor (Lord Herschell) put the matter in a single sentence when he said ([1893] A.C. at p. 90):

> "The question is . . . where the only obligation created is to pay a sum ascertained in a particular manner, where, in other words, such ascertainment is made a condition precedent to the obligation to pay, the courts can enforce the obligation without reference to such ascertainment."

Personally I should rather like to reserve my opinion as to what would have been the effect if the parties in this case, instead of pleading as they did, had pleaded in this way, "We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not, and had gone on to say: "But in the event of that being negatived, we wish this ascertainment of actual damage to be ascertained by arbitration." I should like to reserve my opinion on whether they might not have said so with effect. The very clear argument of counsel for the respondents tried to make out that if he once showed that at a certain time in Costa Rica a certain difference had arisen, then that brought into full operation the effect of the condition precedent in cl. 17 as being applicable to all suits. I do not think that that view can be maintained, because cl. 17 provides for the case of a difference arising as to the amount of loss, and then says:

> "It shall be a condition precedent to any right of action or suit upon this policy that the award of such arbitrator, . . . of the amount of the loss or damage, if disputed, shall be first obtained."

I think it is perfectly clear that that clause necessarily refers to an existing difference, not a historical difference, and it seems to me that when the attitude was taken up by these parties which was taken up in the letters that have been read to me, which the learned Lord Chancellor has referred to, in England, that they repudiated the claim altogether and said there was no liability under the policy whatsoever, that necessarily cut out the effect of cl. 17 as creating a condition precedent against all forms of action. I therefore concur in the motion which has been made by the noble and learned Lord on the Woolsack.

LORD ATKINSON.—I concur on this short ground. I think cl. 17 refers to existing disputes and differences about the amount of loss claimed, and in a contract on indemnity such as this is I do not think that clause has any application whatever, when the person to indemnify says: "You yourself brought about the destruction of the goods that were insured for an indemnity for which you claim," and insists upon a clause which provides that in that state of circumstances all benefit under the policy is forfeited. I therefore think that the order should be made which has been suggested by my noble friend on the Woolsack.

LORD PARKER OF WADDINGTON.—I agree.

LORD PARMOOR.—I concur. The respondents raised an issue on which, if they had succeeded, the appellants would have forfeited all benefit under the policy. This, in my opinion, would have included that benefit that would have been forfeited under cl. 17 of the contract, the policy. At the same time, I should like to express my own opinion that no difference would have arisen as regards matters that could have come under cl. 17, and therefore the clause did not in any case apply.

Appeal allowed.

Solicitors: *Fielder, Jones & Harrison*, for *C. T. Rhodes & Son*, Halifax; *Andrews, Ogilvie & Fisher.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

DUNLOP PNEUMATIC TYRE CO., LTD. *v.* SELFRIDGE & CO., LTD.

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor), March 23, 25 and April 26, 1915]

[Reported [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 886; 31 T.L.R. 399; 59 Sol. Jo. 439]

Contract—Enforcement—Right of third party to sue on contract—Consideration not moving from promisee.

By a contract dated Oct. 12, 1911, D. & Co. agreed to purchase goods from the appellants and undertook not to re-sell them below the appellants' current list price except to genuine trade customers to whom they could sell at a discount. In such a case they agreed, as the appellants' agents, to exact from such customers a similar undertaking. On Jan. 2, 1912, the respondents, who were such customers, agreed to purchase goods of the appellants' make from D. & Co. and gave the required undertaking to maintain the current list price. On the respondents breaking this agreement the appellants sued them for breach of contract.

Held: (i) the agreement of Jan. 2, 1912, entered into by the respondents was made with D. & Co. only; the appellants were not parties to that contract as no consideration moved from them to the respondents; and they, therefore, could not sue on it: (ii) the appellants could not claim that the agreement had been made by D. & Co. on their behalf as undisclosed principals as this was inconsistent with the express terms of the contract; and, therefore, they could not enforce the contract of Jan. 2, 1912.

Per **Curiam:** Even if the appellants were undisclosed principals for D. & Co. no consideration moved from them to the defendants and the contract would also be unenforceable.

Per Viscount Haldane, L.C.: In the law of England certain principles are fundamental. One is that only a person who is party to a contract can sue on it. Our law knows nothing of a jus quæsitum tertio arising by way of contract. . . . A second principle is that, if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request.

Notes. By the Restrictive Trade Practices Act, 1956, a price maintenance agreement may be enforced against a person who is not a party to it. Section 25 (1) provides: "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be re-sold, either generally or by or to a specified class or person, that condition may . . . be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been a party thereto." The case is reported here on its general application to the law of contract.

Considered: *Drive Yourself Car Hire Co. (London), Ltd.* v. *Strutt*, [1953] 2 All E.R. 737; *Green* v. *Russell*, [1959] 2 All E.R. 525. Followed: *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*, [1960] 2 All E.R. 737. Referred to: *Barker* v. *Stickney*, [1919] 1 K.B. 121; *The Lord Strathcona*, [1925] P. 143; *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*, [1932] All E.R.Rep. 527; *Harrier* v. *Armstrong*, [1933] All E.R.Rep. 778; *Smith* v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179; *Re Austin Motors Co.'s Agreements*, [1957] 3 All E.R. 62.

As to rights and liabilities of strangers to the contract, see 8 Halsbury's Laws (3rd Edn.) 66–68; and for consideration, see 8 Halsbury's Laws (3rd Edn.) 113–121. For cases see 12 Digest (Repl.) 233 et seq.

Case referred to: A

(1) *Humble* v. *Hunter* (1848), 12 Q.B. 310; 17 L.J.Q.B. 350; 11 L.T.O.S. 265; 12 Jur. 1021; 116 E.R. 885; 1 Digest (Repl.) 738, *2808.*

Also referred to in argument:

Phelps v. *Prothero* (1855), 16 C.B. 370; 24 L.J.C.P. 225; 1 Jur.N.S. 1170; 3 C.L.R. 906; 139 E.R. 801; 1 Digest (Repl.) 660, *2304.*

Frith v. *Frith*, [1906] A.C. 254; 75 L.J.P.C. 50; 94 L.T. 383; 54 W.R. 618; 22 T.L.R. 388, P.C.; 1 Digest (Repl.) 799, *3260.* B

Clifford v. *Turrell* (1841), 1 Y. & C.Ch.Cas. 138; 14 L.J.Ch. 390; 9 Jur. 633.

Appeal by the plaintiffs in the action from an order of the Court of Appeal (1914), 83 L.J.K.B. 923, reversing a decision of PHILLIMORE, J., in their favour.

Younger, K.C., and *Disturnal, K.C.*, for the appellants. C

Sir Robert Finlay, K.C., *L. Sanderson, K.C.*, and *Herbert L. Tebbs* for the respondents.

The House took time for consideration.

April 26, 1915. The following opinions were read.

VISCOUNT HALDANE, L.C.—In my opinion this appeal ought to fail. Prior D to Jan. 2, 1912, Messrs. Dew had entered into a contract with the appellants to purchase a quantity of tyres and other goods from them at the prices in their list, in consideration of receiving certain discounts. As part of their contract, Messrs. Dew undertook, among other things, not to sell to certain classes of customers at prices below the current list prices of the appellants. They were, however, to be at liberty to sell to a class of customer that included the respon- E dents at a discount which was substantially less than the discount they were themselves to receive from the appellants, but in the case of any such sale they undertook, as the appellants' agents in this behalf, to obtain from the customer a written undertaking that he similarly would observe the terms so undertaken to be observed by themselves. This contract was embodied in a letter, dated Oct. 12, 1911. On Jan. 2 the respondents contracted with Messrs. Dew, in terms F of a letter of that date addressed to them, that, in consideration of the latter allowing them discounts on goods of the appellants' manufacture which the respondents might purchase from Messrs. Dew, less in point of fact than the discount received by the latter from the appellants, the respondents, among other things, would not sell the appellants' goods to private customers at prices below those in the appellants' current list, and that they would pay to the appellants G a penalty for every article sold in breach of this stipulation. The learned judge who tried the case has held that the respondents sold goods of the appellants' manufacture supplied through Messrs. Dew at less than the stipulated prices, and that the question is whether, assuming his finding to be correct, the appellants, who were not in terms parties to the contract contained in the letter of Jan. 2, can sue them. H

In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quæsitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made I is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain continental countries or of Scotland, but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

In the case before us, I am of opinion that the consideration, the allowance of what was in reality part of the discount to which Messrs. Dew, the promisees, were entitled as between themselves and the appellants, was to be given by Messrs. Dew on their own account, and was not in substance, any more than in form, an allowance made by the appellants. The case for the appellants is that they permitted and enabled Messrs. Dew, with the knowledge and by the desire of the respondents, to sell to the latter on the terms of the contract of Jan. 2, 1912. But it appears to me that even if this is so the answer is conclusive. Messrs. Dew sold to the respondents goods which they had a title to obtain from the appellants independently of this contract. The consideration by way of discount under the contract of Jan. 2 was to come wholly out of Messrs. Dew's pocket, and neither directly nor indirectly out of that of the appellants. If the appellants enabled them to sell to the respondents on the terms they did, this was not done as any part of the terms of the contract sued on. No doubt it was provided as part of these terms that the appellants should acquire certain rights, but these rights appear on the face of the contract as jura quæsita tertio, which the appellants could not enforce. Moreover, even if this difficulty can be got over by regarding the appellants as the principals of Messrs. Dew in stipulating for the rights in question, the only consideration disclosed by the contract is one given by Messrs. Dew, not as their agents, but as principals acting on their own account.

The conclusion to which I have come on the point as to consideration renders it unnecessary to decide the further question as to whether the appellants can claim that a bargain was made in this contract by Messrs. Dew as their agents; a bargain which, apart from the point as to consideration, they could therefore enforce. The form of the contract which we have to interpret leaves the appellants in this dilemma, that if they say that Messrs. Dew contracted on their behalf, they gave no consideration, and if they say they gave consideration in the shape of a permission to the respondents to buy, they must set up further stipulations, which are neither to be found in the contract sued upon nor are germane to it, but are really inconsistent with its structure. That contract has been reduced to writing, and it is in the writing that we must look for the whole of the terms made between the parties. These terms cannot, in my opinion, consistently with the settled principles of English law, be construed as giving to the appellants any enforceable rights as against the respondents. I think that the judgment of the Court of Appeal was right, and I move that the appeal be dismissed with costs.

LORD DUNEDIN.—I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. Notwithstanding these considerations, I cannot say that I have ever had any doubt that the judgment of the Court of Appeal was right. I am content to adopt from a work of SIR FREDERICK POLLOCK (POLLOCK ON CONTRACTS (8th Edn.)), to which I have often been under obligation, the following words as to consideration:

> "An act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable" (ibid. at p. 175).

The agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce he must show consideration, as above defined, moving from

Dunlop to Selfridge. In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale, but that agreement for sale is an agreement entirely between Dew and Selfridge. The tyres, the property in which upon the bargain are transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop, held these tyres as proprietor, and not as agent. What then did Dunlop do, or forbear, to do, in a question with Selfridge? The answer must be, Nothing. He did not do anything, for Dew, having the right of property in the tyres, could give a good title to anyone he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract, which action, however, could never create a vitium reale in the property of the tyres. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed. To my mind, this ends the case. That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt. But that has not been done in this instance, and, as Dunlop's advisers must have known of the law of consideration, it is their affair that they have not so drawn the contract. I think the appeal should be dismissed.

LORD ATKINSON.—The action out of which this appeal arises was brought by the appellants against the respondents to restrain the latter from selling or offering for sale certain goods manufactured by the appellants on terms other than those specified in a certain agreement, dated Jan. 2, 1912, alleged to have been entered into between the respondents and the appellants through Messrs. A. J. Dew & Co. as the agents of the latter, and to recover the liquidated damages made recoverable by the terms of this agreement in respect of the breaches thereof complained of, and for an account of the goods sold in violation of the same.

The main facts of the case are undisputed. [His lordship stated the facts and continued:] The only conditions of the contract necessary to refer to are, first, a provision that Dew & Co. should not sell or offer for sale any Dunlop motor tyres, covers, or tubes to any other person, firm, or company at prices less than these list prices; but should be at liberty to allow to persons legitimately engaged in the motor trade (other than co-operative societies) a discount not exceeding ten per cent. off such list prices, plus the authorised scale of rebates on the net values of the purchases of the aforesaid goods, and further, that in case of any sale of the same to any such traders as aforesaid, Dew & Co. should, as the appellants' agents, obtain from the trader a written undertaking that he would similarly observe the list prices, terms, and conditions of sale on any resales made by him, whether to private customers or other traders, would forward these undertakings to the appellants on demand, and would not allow such trade discounts to any of the persons aforesaid without previously obtaining such a written undertaking; and, second, a condition that Dew & Co. should pay £5 for every tyre, cover, or tube sold or offered for sale in breach of the conditions of the contract. This agreement was an agreement for the sale and purchase of the appellants' goods, with certain contractual restrictions on the purchaser's right of resale. Dew & Co., unless restrained by injunction, could sell the goods they had purchased from the appellants to any sub-vendee on any terms they pleased, subject to this, that they exposed themselves to an action for breach of contract at the appellants' suit if they did not observe the terms of the agreement. But they did not require the special consent of the appellant to any particular resale made in conformity with the terms of the agreement. That consent was given in anticipation the moment the agreement was entered into. Dew & Co. were then clothed with absolute authority to resell on the terms specified in the agreement. The appellants had no power to prohibit or restrain them from doing so. I think it may be fairly assumed that the respondents were aware of the nature of this agreement between Dew & Co. and the appellants. When one turns to the contract relied

upon—namely, the letter dated Jan. 2, 1912, drawn up by Dew & Co., and signed on behalf of the respondents by A. Horsfield—it is clear that Dew & Co. did introduce into it in substance all the stipulations they were bound by their contract with the principals to introduce. They did nothing which that contract did not authorise. They merely exercised their right to re-sell on the terms prescribed. It was contended by the appellant's counsel, as I understood them, that the discount of ten per cent. having been given to the respondents, it must be taken that the appellants gave a specific and special consent to this particular contract with the respondents, and that that special consent constituted a consideration, moving from the appellants to the respondents, sufficient to support the contract contained in the letter of Jan. 2, 1912, as a contract between the appellants and the respondents. In my opinion, that contention is entirely unsustainable.

It was also urged on behalf of the appellants that it was competent for the latter to show that Dew & Co. entered into this contract of Jan. 2, 1912, as agents for undisclosed principals, namely, the appellants in the present action. Even if that were so, and the appellants were to be treated as parties to the contract contained in this letter, it does not get over the difficulty. The contract is as to them a nudum pactum, since no consideration moves from them to the respondents, or to any other person or body at the respondents' request. I confess that the inclination of my opinion is that this case comes within the principle of the decision in *Humble* v. *Hunter* (1), and that consistently with the terms of the letter itself the appellants cannot claim to be principals on whose behalf Dew & Co. contracted as their agents. KENNEDY, L.J., has pointed out in his judgment (83 L.J.K.B. at p. 929) the different stipulations in the contract which are irreconcilable with the supposition that Dew & Co. did not contract as principals. But however this may be, it is, I think, clear that no consideration moved from the appellants to support any contract made with them and the respondents, and I prefer to base my judgment on that ground. I think, therefore, that the judgment appealed from was right, and this appeal be dismissed with costs here and below.

LORD PARKER OF WADDINGTON.—Even assuming that the undertaking upon which this action is founded was given by the respondents to Messrs. A. J. Dew & Co. as agents for the appellants, and was intended to enure for their benefit, the appeal cannot succeed unless the undertaking was founded on a consideration moving from the appellants, and in my opinion there was no such consideration. The appellants did not give or give up anything on the strength of the undertaking. They had sold tyres to Messrs. A. J. Dew & Co. on the terms that the latter should not re-sell them at prices less than those specified in the appellants' price list, except that Messrs. A. J. Dew & Co. were to be at liberty to allow to persons legitimately engaged in the motor trade a certain discount off such price list if they, as agents for the appellants, obtained from such persons a written undertaking such as that upon which this action is founded. In re-selling these tyres to the respondents, and obtaining from the respondents the undertaking in question, Messrs. A. J. Dew & Co. admittedly committed no breach of contract. The sale was, of course, a good consideration for the undertaking moving from Messrs. A. J. Dew & Co., but the appellants, in whose favour the undertaking was given, being in the position of volunteers not parties to the contract of sale, cannot sue on it. The case was argued on behalf of the appellants as though what was done by Messrs. A. J. Dew & Co. would have been unlawful but for the leave and licence of the appellants, and that such leave and licence, though general in form, must be taken as given on the occasion of each sale, in consideration of the undertaking. I cannot accept this contention. In the first place, it is wrong to speak of an exception from a restrictive contract as importing any leave or licence at all. But for any contract to the contrary, Messrs. A. J. Dew & Co. were entitled to re-sell the goods supplied to them by the appellants

upon any terms they might think fit, and in re-selling as they did there was no breach of any restrictive contract. Even, however, if the sale can be considered as lawful only by licence of the appellants, the licence was given once for all in their contract to Messrs. A. J. Dew & Co., and was not given as part of the terms upon which any particular sale was allowed. The appeal fails on this ground and should be dismissed with costs.

LORD SUMNER.—There are two instances of sale and delivery complained of in this case. The steps in the Jameson transaction are as follows. Those in the other, the Strauss transaction, are similar and need not be analysed. On Oct. 12, 1911, Messrs. Dew & Co., motor accessory factors, contracted with the appellants, the Dunlop Pneumatic Tyre Co., in terms of the latter's price-maintenance agreement then current. By this Messrs. Dew & Co. became bound (inter alia) to buy from the Dunlop company motor tyres, covers, tubes, and sundries to the net value of £2,000 before the expiration of September, 1912, and the appellants became bound, if the contract continued to subsist, as it did, to sell and deliver such goods up to that value, whenever reasonably required to do so. On Dec. 21, 1911, a Captain Jameson thought fit to ask the respondents, Messrs. Selfridge & Co., Ltd., who are described as wholesale and retail merchants, for their lowest price for a Dunlop motor tyre, grooved and non-skid, 815 by 105. Their answer was that, on receipt of his order, such a tyre would be procured and the price would be £5 18s. 2d., which was the appellants' list price, less 7½ per cent. On Jan. 1, 1912, Captain Jameson sent to the respondents an order for the tyre, and also the money for it, and on the same day the order was accepted, and delivery of the tyre was promised for the following day. In fact, on Jan. 2 the respondents ordered this tyre from Messrs. Dew & Co. by telephone. Messrs. Dew & Co., in turn, ordered it by telephone from the appellants; it was delivered by them to Messrs. Dew & Co., and they sent it to the respondents who delivered it to Captain Jameson. Of course the respondents did not mention Captain Jameson to Messrs. Dew & Co., nor did Messrs. Dew & Co. mention the respondents to the appellants. So far the respondents had signed no price-maintenance agreement. They had been pressed to do so, and no doubt knew that the reason why they were being pressed by Messrs. Dew & Co. was because the appellants, in turn, strictly required them to obtain these agreements from those of their customers to whom they sold. Within two or three days of Jan. 3 they did sign such an agreement, dating it Jan. 2, and delivering it to Messrs. Dew & Co., to whom it was addressed, a week or so afterwards. It is for breach of this agreement that the appellants sued.

The parties have been desirous of knowing their reciprocal rights and duties, if any, arising out of this agreement, and have accordingly raised two broad questions: (i) Is there any agreement between these parties at all? (ii) If so, is there any consideration moving from the appellants to support it and make it bind the respondents to them? But for this there would have been a good deal to be said for the proposition that a bargain and sale, clearly complete before this agreement was signed or dated, could be no breach of it, and that the performance of that bargain by delivery of the goods after the price-maintenance agreement was made, could hardly be a ground for the grant of an injunction. The true question, however, is that of consideration; but both parties seem to have been somewhat slow to realise it. The statement of claim averred that the considerations for the agreement were those therein mentioned, which was an averment of a demurrable cause of action, since the expressed consideration moved only from Messrs. Dew & Co., and were not available to the appellants. The defence, even though amended and re-amended, never took the point on which this appeal turns, but only alleged want of consideration, in so far as the agreement purported to refer to Dunlop tyres purchased from persons other than Messrs. Dew & Co.

Let it be assumed without discussion that the agreement which the respondents

A signed speaks from its date, Jan. 2. Let it be assumed also that evidence was admissible to add an unexpressed consideration moving from the appellants to the expressed consideration moving from Messrs. Dew & Co. Let it be assumed further (though this is a large assumption) that the terms of the instrument do not so designate Messrs. Dew & Co. as the principals and the only contracting parties as to shut out proof that the appellants were their undisclosed principals. B After all, what consideration moved from the appellants? As the point is not insisted on that Messrs. Dew & Co. sold and delivered to the respondents first, and procured their written undertaking only afterwards, I think that Messrs. Dew & Co. exactly performed the conditions of their agreement with the appellants. The firm of Selfridge & Co. was the "trader" within that agreement, and Messrs. Dew & Co. duly obtained that firm's written undertaking to the intent therein C described. The undertaking was in the appellants' own form, and Messrs. Dew & Co. did not contract even by implication that the undertaking which they would obtain should be binding. The respondents signed what they were asked to sign, but nothing precluded them from saying afterwards that it was nudum pactum. At first they thought and said that they were bound, but this did not alter their position or the appellants', or supply a consideration where none existed before. D They made no request for the tyre to the appellants, for they did not know that Messrs. Dew & Co. had not got it in stock, or, if they knew, they did not constitute Messrs. Dew & Co., their agents, to ask the appellants for it. Messrs. Dew & Co. asked for it by virtue of their agreement to buy up to £2,000 worth of goods, and so it was that the appellants delivered it. Messrs. Dew & Co. did not mention to the appellants that so far no written undertaking had been signed by their E customer, and the appellants, knowing nothing, waived nothing. The appellants, as alleged promisees, neither did nor suffered nor forebore anything, nor promised to do any of these things, or anything at all, in exchange for the undertaking purporting to be given by the respondents. It was contended that consideration might be found in the fact that the appellants, who could sell or not sell their own proprietary products, as they chose, only enabled the respondents to get the F tyres by agreeing to supply Messrs. Dew & Co., and only agreed to supply them on the restrictive terms in question. This breaks down as soon as it is examined. To this transaction the respondents were strangers. It happened before they received or gave any order. The delivery of the tyres by the appellants was in performance of an obligation unknown to the respondents (though I daresay they could have surmised it if it had been any business of theirs) and prior to their G appearance on the scene. In this transaction nothing moved from the appellants to the respondents. It would have been the same if the other firm had not existed. The appellants have sued on a nudum pactum.

The appellants' "distributing organisation" has been before your Lordships' House before, and I do not suppose you have heard the last of it now. I think it better, accordingly, to express no opinion on any of the other questions that have H been raised, since this one decides the case, and the others may occur again. Much may be said both ways on the right of the appellants to come forward as undisclosed principals upon the contract in question. I express no opinion except that I do not wish to be supposed entirely to assent to the broad proposition, apparently suggested in some of the judgments of the Lords Justices, that a contract, in which one and the same party contracts both on his own behalf and for I an undisclosed principal, is a legal impossibility. So stated, I think the proposition somewhat too wide. If no more is meant than what SWINFEN EADY, L.J., puts (83 L.J.K.B. at p. 931): "Where a party contracts in his own name, an undisclosed principal cannot sue on the contract if the terms are such as import that the person apparently contracting is the real and only principal," it is not open to objection. I think that the appeal should be dismissed.

LORD PARMOOR.—The main question in this appeal is whether it is competent for the appellants to bring an action to enforce certain conditions in a

contract made between the respondents and Messrs. A. J. Dew & Co. The appellants are manufacturers and Messrs. A. J. Dew & Co. are factors and dealers in motor tyres, covers, or tubes. It is the object of the appellants to enforce and maintain certain general conditions and prices in the sale of their motor tyres, covers, or tubes, and it may be assumed that it is important for their business to attain this object. The appellants are not in form parties to the contract which they seek to enforce. They claim to be undisclosed principals. If they can prove this, they get over the first difficulty. Unless the appellants can prove that they are undisclosed principals, they fail at the outset, since the stipulations, which they seek to enforce, are not of such a character that a person, not a party to the contract, has a right to bring an action to enforce them. There is no question that parol evidence is admissible to prove that the plaintiff in an action is the real principal to a contract; but it is also well established law that a person cannot claim to be a principal to a contract, if this would be inconsistent with the terms of the contract itself. KENNEDY, L.J., in his judgment in the Court of Appeal states his conclusion that it would be inconsistent with the terms of the contract itself to admit the claim of the appellants to be regarded as undisclosed principals with a consequent right to bring an action to enforce certain of its conditions. I agree with this conclusion, and it is sufficient to dispose of the case.

The main difficulty in the way of the appellants is that, apart from any question of form, they cannot show that there is any consideration sufficient to support a contract as between themselves and the respondents. On Oct. 12, 1911, the appellants entered into a contract with Messrs. A. J. Dew & Co. that in consideration of discounts and rebates being allowed off the appellants' current price list, they would purchase from the appellants goods to the quantity therein mentioned. There were several conditions attached to the contract, among them the following:

> "We will, as your agents in this behalf, in the case of any sale of your tyres, covers, or tubes to a trader obtain from such trader a written undertaking that he will similarly observe your list prices, terms, and conditions of sale current at the time of sale in any re-sales by him."

In accordance with this obligation, Messrs. A. J. Dew & Co. did make a contract with the respondents that they would similarly observe the appellants' prices, terms, and conditions of sale current at the time of any sale by them. There is no dispute that the respondents did not observe the conditions attached to their contract with Messrs. A. J. Dew & Co. The appellants, in their action, claimed an injunction and damages at the rate of £5 for each and every tyre, cover, or tube sold by the respondents in breach of the said agreement. I understood counsel for the appellants to say that under the contract between themselves and Messrs. A. J. Dew & Co. of Oct. 12, 1911, the appellants reserved some control over the sale of their goods by Messrs. A. J. Dew & Co. to third parties, and that in this respect there was consideration moving from the appellants to the respondents sufficient to support a contract. I am of opinion that no such control was reserved to the appellants, and that Messrs. A. J. Dew & Co., without any further authority or licence from the appellants, had a full right as factors or dealers in the appellants' goods to sell them to the respondents. It may well be that the appellants under their contract with Messrs. A. J. Dew & Co. have the power to prevent the supply of the appellants' goods to any person whose supplies the appellants' request Messrs. A. J. Dew & Co. to suspend, but this is a wholly different proposition from a claim to be entitled to bring an action against the purchasers of goods sold by Messrs. A. J. Dew & Co. in the course of their business. If Messrs. A. J. Dew & Co. had full power to sell the goods in question to the respondents, as factors or dealers, it is, I think, clear that the appellants were not in a position to give, and did not give, any consideration which could support a contract between themselves and the respondents, and that the action

fails. I abstain from discussing what remedy Messrs. A. J. Dew & Co. might have on their contract with the respondents, or whether the appellants might not have attained their object in some other way; it is sufficient to say that the appellants cannot succeed in their present action and that the appeal fails.

Solicitors: *John B. & F. Purchase*; *Nunn, Popham & Starkie.*

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

SIDNEY *v.* NORTH EASTERN RAIL. CO.

[KING'S BENCH DIVISION (Avory, Rowlatt and Shearman, JJ.), April 30, May 1, 4, 7, 1914]

[Reported [1914] 3 K.B. 629; 83 L.J.K.B. 1641; 111 L.T. 677]

Compulsory Purchase—Purchase money—Compensation—Special adaptibility—Railway purposes—Special value arising from part of public railway being on land—Enhanced rent on renewal of lease.

In 1851, by a lease expiring on Mar. 25, 1913, a freeholder demised to colliery owners two pieces of land on which a colliery railway was constructed. A small railway company acquired the interest of the licensees in the railway, but not that of the landowner. Subsequently, the North Eastern Railway Co. absorbed the smaller railway and ran their main lines over the land. In 1890 compulsory powers were obtained to take the land, and in 1893 a notice to treat was served upon the landowner. Arbitration proceedings did not take place till 1910, the railway company having continued to pay the rent. The railway was the only means of transport from two neighbouring collieries to a port.

Held: in arriving at the purchase money and compensation payable to the landowner for the pieces of ground the arbitrator should take into consideration (i) the special adaptability of the land for railway purposes, but not any special value arising from the fact that there was on the land a part of a public railway or that such railway formed part of the main line of the railway company, and (ii) the enhanced rent which he found that the landowner was likely to receive upon the renewal of the lease to the colliery owners or to the railway company.

The question of "special adaptability" considered.

Notes. Considered: *Vyricherla Narayana Gajapatiraju (Raja)* v. *Vizagapatam Revenue Divisional Officer*, [1939] A.C. 302. Referred to: *Swift* v. *Board of Trade*, [1926] 2 K.B. 131.

As to measure of compensation generally, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 11 Digest (Repl.) 126 et seq. As to special adaptability, see 10 HALSBURY'S LAWS (3rd Edn.) 95; and for cases see 11 DIGEST (Repl.) 133, 134. As to costs of arbitration, see 10 HALSBURY'S LAWS (3rd Edn.) 188; and for cases see 11 DIGEST (Repl.) 216 et seq.

Cases referred to:

(1) *Re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; 77 L.J.K.B. 1009; 99 L.T. 767; 72 J.P. 437; 24 T.L.R. 858; 52 Sol. Jo. 173; 6 L.G.R. 1106, C.A.; 11 Digest (Repl.) 133, *182*.

(2) *Re Gough and Aspatria, Silloth and District Joint Water Board*, [1904] 1 K.B. 417; 73 L.J.K.B. 228; 90 L.T. 43; 68 J.P. 229; 52 W.R. 552; 20 T.L.R. 179; 48 Sol. Jo. 207, C.A.; 11 Digest (Repl.) 133, *181*.

(3) *Re Countess of Ossalinsky and Manchester Corpn.* (1883), Browne & Allan's Law of Compensation, 2nd Edn. 659, D.C.; 11 Digest (Repl.) 133, *179*.

Award of an umpire stated in the form of a Special Case.

The award recited that by a notice in writing dated June 9, 1893, the North Eastern Railway Co. (hereinafter called "the railway company") gave notice to Henry Sidney (herein called "the landowner") and others that they required to purchase and take for the purposes of the North-Eastern Railway Act, 1890, and of the Acts therewith incorporated, which included the Lands Clauses Consolidation Act, 1845, the lands mentioned in the schedule to the case which the railway company were authorised to purchase and take. Arbitrators were appointed in July and December, 1910, respectively, and an umpire was appointed in June, 1911. The arbitrators having differed, the umpire heard the matter, and made an award in which he set out the facts and stated that it was contended [para. 8 of the Special Case] before him on behalf of the landowner that in determining the amount of the purchase money and compensation to be paid in respect of the land, he (the umpire) should have regard (a) to the special adaptability of the land to railway purposes arising from the fact of the existence on it of an integral part of a public railway, and (b) to the fact that if the railway company had not exercised their statutory powers of taking the land it would have been necessary for them or for the coal company to have renewed the wayleave lease owing to the railway held under it forming part of the main line of the public railway over which a large traffic passed daily. On behalf of the railway company it was contended [para. 9 of the Case] that the umpire ought to disregard entirely any value that the land might have to the railway company, and that he should treat the value to the landowner as being determined by the rent of £51 paid by the railway company, and that under the circumstances set forth in this case there could not be any probability of any increased rent being obtainable by the landowner from the coal company or any other party than the railway company. The umpire found [in para. 10 of the Case] that, if the railway company had not exercised their statutory powers and the wayleave lease had expired, there would have been a reasonable probability that the landowner would have renewed the lease to the colliery lessees at an enhanced rent if the lease had not been renewed to the railway company, and that such renewed lease could have been assigned to the railway company by the colliery lessees, thereby placing the railway company for a further term of years in the same position as they had been of many years, subject only to the payment of the increased rent. He was of opinion [para. 11 of the Case] that, while he ought to disregard any special value which the land might have to the railway company by reason of its forming part of their public railway, he ought to take into his consideration the probability of the landowner being able to renew the wayleave lease to the colliery lessees at an enhanced rent as mentioned in the last precedent paragraph, and that in assessing the compensation he ought to have regard to the enhanced rent which in his judgment the landowner might reasonably have expected to obtain as between a willing lessor and a willing lessee for such renewal if the railway company had not obtained and exercised statutory powers of taking the land. It was also contended [para. 12 of the Case] before the umpire on behalf of the landowner that in assessing compensation the umpire should include interest on the amount of the purchase money assessed by him as from the date of the notice to treat, but in the umpire's opinion, having regard to the circumstances of this case, the landowner was not entitled to claim interest, and his award did not comprise any interest.

Gore-Browne, *K.C.*, and *Disturnal*, *K.C.*, for the landowner.

Upjohn, *K.C.*, and *Courthope-Munroe* for the railway company.

Cur. adv. vult.

May 7, 1914. The following judgments were read.

AVORY, J.—The precise question raised between the parties in this case has not been determined in any of the decisions to which our attention has been

called. We think it advisable that the judgment of the court should be given, in the light of those decisions, in the form of direct answers to the questions submitted by the umpire.

First, we think the contentions of the railway company in para. 9 of the Special Case are wrong. It was admitted at the Bar that they could not be supported. Secondly, as to the contentions of the landowner in para. 8 of the Case, we think that the umpire should have had regard to the special adaptability of the land for railway purposes, but not to the fact of the existence on it of an integral part of a public railway, or to the fact of such railway forming part of the main line. Thirdly, we think that the umpire was entitled to find as he has done in para. 10 of the Special Case, and we see no reason for doubting the correctness of such finding. Fourthly, as to para. 11 of the Special Case, assuming the amount of purchase money and compensation is calculated on the basis of a rental under a new lease, we think that, although it is right to disregard the special value which the land has to the railway company by reason of it forming part of their public railway, the umpire ought to have taken into consideration the enhanced rent which the landowner might reasonably have expected to obtain in competition between the colliery owners and the railway company if the railway company had not obtained and exercised statutory powers of taking the land. Fifthly, as to para. 12 of the Case upon which our opinion also was invited in the statement of the Case, that has been abandoned by the consent of both parties on the ground that the point does not arise at this stage.

ROWLATT, J.—I agree. It is well settled that the compensation must represent the value to the owner, not to the purchaser. But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

Special adaptability is an expression which is wide enough to include special adaptability for any purpose, but where the special adaptability is for purposes other than those of the compulsory purchaser it is merely an element in the calculation of the probable competition for the land, that is, an element in its general value. It only gives rise to a question in compensation law, where, existing for the purposes of the promoters, its consideration seems at first sight to infringe the principle that value due to the scheme is to be excluded. For example, a piece of land may have a special value for a particular crop, for a particular sort of building scheme, or for a reservoir, or for several of these purposes. But if it is going to be taken for an artillery or rifle range, or for a railway, these are elements of general value only, and raise no question. Suppose, however, it is to be taken for a reservoir, its special suitability for that purpose (being the purpose of the scheme) does raise the question how far that can be taken into consideration without infringing the rule against giving value due to the scheme. Special adaptability for the particular scheme may be taken into consideration where it can be said that there might have been other competitors for it for that purpose, and to the extent that the competition of such possible purchasers with each other and with the promoter would raise the possible price that might have been obtained in the market. But no case has raised directly for decision the precise point whether when the possibility of other competitors for the same purpose is negatived or after the price has been raised to a point at which such competition ceases, there is any room in the former case or any further room in the latter for the factor of special adaptability. FLETCHER MOULTON, L.J.'s reasoning in *Re Lucas* and *Chesterfield Gas and Water Board* (1) negatives any such proposition. The judgments of VAUGHAN WILLIAMS and BUCKLEY, L.JJ., in the same case contain phrases wide enough to affirm it, but they are not expressly directed to it. *Re Gough and Aspatria, Silloth and District Joint Water Board* (2) does not really deal with it. It seems we cannot shelter ourselves under authority but must

deal with the point by determining to which conclusion the true application of settled principles leads us.

If and so long as there are several competitors including the actual taker, who may be regarded as possibly in the market for purposes such as those of the scheme, the possibility of their offering for the land is an element of value in no respect differing from that afforded by the possibility of offers for it for other purposes. As such it is admissible as truly market value to the owner and not merely value to the taker. But when the price is reached at which all other competition must be taken to fail to what can any further value be attributed? The point has been reached when the owner is offered more than the land is worth to him for his own purposes, and all that anyone else would offer him except one person, the promoter, who is now, though he was not before, freed from competition. Apart from compulsory powers the owner need not sell to that one, and that one would need to make higher and yet higher offers in respect of the value to him for his scheme. And he is only driven to make such offers because of the unwillingness of the owner to sell without obtaining for himself a share in that value. Nothing representing this can be allowed.

For these reasons I agree with the formal answers we propose to make to the arbitrator. In conclusion, I would draw attention to a fallacy in fact which underlies the contention of the owner in this case. He says he is entitled to special value for his property as part of a public railway. At the moment of the cesser of the wayleave right that is not its character; it is merely land in the track of a projected public railway and wanted for it. The special want of the owner of that public railway for this piece of land cannot be taken into consideration in valuing it.

SHEARMAN, J.—I am of the same opinion. I agree entirely with the written judgment of my brother AVORY, which is intended to law down a pronouncement of the entire court as to the principles which in this case should guide the umpire in assessing compensation. I have also read the judgment of my brother ROWLATT, and I agree with it entirely. I add a few observations because there are many cases of this kind heard throughout the country, and by arbitrators, and it is seldom that they come before the courts. All those who have been practitioners in this class of business are aware how often arbitrators are puzzled by the problems that are put before them when the parties do not wish, because of the delay and expense, to have these problems put before the court. I therefore desire to make a few observations as to the meaning of the phrase "special adaptability," and as to what I think was the entire fallacy which underlay the argument of the claimant in this case.

The facts of the present case are these: In the year 1851 the freeholders of the land granted a wayleave for a considerable number of years to certain persons for the purpose of making a private colliery railway. In the year 1854 a small railway company took over that undertaking and made it a public railway. Subsequently the North Eastern Railway Co. absorbed the smaller railway company under one of their Acts and took over their entire undertaking. The railway company then proceeded to run one of their main lines of railway over a portion of the land to which they only had title as assignees of the original holders of the land. Somewhere prior to the year 1890 the North Eastern Railway Co. discovered this defect in their title, and they accordingly remedied it by obtaining compulsory powers to take this land by their Act of 1890, and on June 9, 1893, they served notice to treat upon the freeholders. At that time the problem did not arise, owing to the friendly relations which existed between the landowner and the company, or rather as the wayleave was still running, and had some considerable time to run before the question of the value of the land to be taken came up for settlement. It is clear on practice and on settled law that it is the duty of an arbitrator or umpire to find the value of the land at the time of the notice to treat, and in finding what is its value he must find what is its value to the seller and not

what is the value to the person who has acquired compulsory power to take it. In this case the claimant has been trying to obtain an enhanced value from the railway company on the sole ground that if the wayleave expired, they would be left, not with a main line on the premises, but with a bit of the main line ending at one place and another bit beginning at another place, because the moment the wayleave expired the railway company became trespassers with no title to run their railway over this land at all. It was of importance to the railway company to acquire this intermediate part in order to carry on their undertaking, but this was entirely a value and a special value to the railway company and not in that sense a special value to the landowner. The only way in which the existence of the railway company gave any value to the owner was that they were one of several people who might have been willing to buy the land quite apart from the purposes for which they obtained compulsory powers. Looking at the facts of this case the arbitrator is only entitled in the manner laid down in the judgment read by my brother AVORY to look at the value of the land looking at the different colliery companies and the railway company as persons who would be liable to compete in fixing the price to the landowner if he was willing to sell and they were all willing to buy, apart from any statutory powers.

I only desire to make one other observation, and that is as to the meaning of the phrase "special adaptability." Long before *Re Gough and Aspatria, Silloth, and District Joint Water Board* (2) and the *Chesterfield Case* (1) were reported in the courts practitioners in this class of business were well acquainted with what was known as the *Countess of Ossalinsky's Case* (3), the judgments in which have been reported in the books of practice on the subject; and from that time onward the ingenuity of claimants has been exercised in discovering special adaptability of some sort in any kind of land compulsorily taken; and arbitrators have often had to deal with it. The statements of FLETCHER MOULTON, L.J., as to special adaptability in his judgment in *Re Lucas and Chesterfield Gas and Water Board* (1) are those which should guide arbitrators. Special adaptability is nothing more than an element of market value. If land is taken on the borders of a navigable river, that is a recomendation, because a class of persons would be likely to take it for the purposes of a wharf, and that I daresay would be described as "special adaptability"; but special adaptability is merely one kind of special value which is likely in the market to attract a class of purchaser or purchasers who would come into competition. In this case the special adaptability to the railway company ought to be taken into consideration, because owing to collieries round about and to the presence of other railways in the neighbourhood it may well be that this land has a special value generally for the purposes of a railway apart altogether from any exigencies of the North Eastern Railway Co. Looked at in that light, the expression "special adaptability" may be very well used as meaning nothing more than that it has a special value in the market. As regards the general question of competition, I would say that competition of buyers may be and very often is in the market competition between people who have themselves different objects in buying. A particular part of a railway might find a purchaser who wanted it for the purposes of a reservoir or one who wanted it for chemical works or something of that sort, and the fact that you can only find one purchaser, including the person who might afterwards apply for statutory powers, does not prevent there being competition for the land, but the value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

On these grounds I entirely agree with the judgment written by my brother AVORY as laying down the principles upon which the arbitrator should be guided in this case.

Judgment accordingly.

Solicitors: *E. Flux, Leadbitter & Neighbour*, for *C. Alderson*, Morpeth; *R. F. Dunnell.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

BRITISH MURAC SYNDICATE, LTD. *v.* ALPERTON RUBBER CO., LTD.

[CHANCERY DIVISION (Sargant, J.), April 14, 15, 16, 1915]

[Reported [1915] 2 Ch. 186; 84 L.J.Ch. 665; 113 L.T. 373; 31 T.L.R. 391; 59 Sol. Jo. 494]

B

Company—Articles—Alteration—Alteration in breach of agreement—Injunction.

Where it is a term of a contract made by a company that an article of association of the company is not to be altered, the company is not at liberty to alter its articles so as to break that contract, and if it attempts to do so, may be restrained by injunction, at the suit of the other party to the contract.

C

Allen v. *Gold Reefs of West African, Ltd.* (1), [1900], 1 Ch. 656, applied.

Punt v. *Simmons & Co., Ltd.* (2), [1903] 2 Ch. 506, stated to have been overruled on this point in *Baily* v. *British Equitable Assurance Co.* (3), [1904] 1 Ch. 374.

D

By an agreement made between a syndicate and a company, it was provided that so long as the syndicate held at least 5,000 shares in the company they should have the right of nominating two directors on the company's board. It was further recited in the agreement that the company's memorandum and articles of association had been already prepared with the privity of the syndicate. Article 88 of the articles provided that so long as the syndicate held at least 5,000 shares in the company it should have the right of nominating two directors, so that both under the articles and by virtue of the agreement the syndicate had this right. From time to time until 1915 the syndicate exercised this right. Differences having arisen among the directors, the syndicate on Mar. 3, 1915, nominated T. and W. as directors. These persons the company refused to accept, and called a meeting to pass a special resolution cancelling art. 88 so as to remove the company's obligation to appoint the syndicate nominees. Thereupon this action was launched claiming (inter alia) a declaration that T. and W. had become directors of the company; an injunction to restrain the company or its directors from excluding T. and W. from its board; specific performance of the agreement; and an injunction restraining the company from cancelling art. 88. The company had no reasonable personal objection to T., but might have a reasonable personal objection to W.

E

F

G

Held: (i) the company would and should be restrained by injunction from cancelling art. 88 as to do so would be a breach of its contract; (ii) as the objection to the proposed directors was not to them personally, but to the right of the syndicate to nominate them, and as they would constitute a minority, a declaration that T. and W. had become directors would be made, but no injunction to restrain the company from excluding them from the board would be made at present.

H

Bainbridge v. *Smith* (4) (1889), 41 Ch.D. 462, applied.

Semble: if necessary such an injunction would have been granted as to T.

Notes. Distinguished: *Plantations Trust, Ltd.* v. *Bila (Sumatra) Rubber Lands, Ltd.* (1916), 85 L.J.Ch. 801.

As to how far a company may alter its articles of association, see 6 HALSBURY'S LAWS (3rd Edn.) 272–273, para. 565; as to appointment of directors by an outside body, see ibid., 278, para. 572, text and note (e); as to injunction against a company to restrain a wrong to an individual member, see ibid., 447, para. 865; and for cases see 9 Digest (Repl.) 591–596, 456, and 728 respectively.

I

Cases referred to:

(1) *Allen* v. *Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656; 69 L.J.Ch. 266; 82 L.T. 210; 48 W.R. 452; 16 T.L.R. 213; 44 Sol. Jo. 261; 7 Mans. 417, C.A.; 9 Digest (Repl.) 592, *3920.*

(2) *Punt* v. *Simmons & Co., Ltd.*, [1903] 2 Ch. 506; 72 L.J.Ch. 768; 89 L.T. 525; 52 W.R. 41; 47 Sol. Jo. 619; 10 Mans. 415; 9 Digest (Repl.) 593, *3925*.

(3) *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374; 73 L.J.Ch. 240; 90 L.T. 335; 52 W.R. 549; 20 T.L.R. 242; 11 Mans. 169, C.A.; reversed sub nom. *British Equitable Assurance Co., Ltd.* v. *Baily*, [1906] A.C. 35; 75 L.J.Ch. 73; 94 L.T. 1; 22 T.L.R. 152; 13 Mans. 13, H.L.; 9 Digest (Repl.) 593, *3926*.

(4) *Bainbridge* v. *Smith* (1889), 41 Ch.D. 462; 60 L.T. 879; 37 W.R. 594; 5 T.L.R. 375, C.A.; 9 Digest (Repl.) 465, *3037*.

(5) *Automatic Self-Cleansing Filter Syndicate Co., Ltd.* v. *Cuninghame*, [1906] 2 Ch. 34; 75 L.J.Ch. 437; 94 L.T. 651; 22 T.L.R. 378; 50 Sol. Jo. 359; 13 Mans. 156, C.A.; 9 Digest 498, *3282*.

Witness Action.

The facts and arguments sufficiently appear from the judgment of SARGANT, J.

Gore-Browne, K.C., and *Whinney* for the plaintiffs.
Grant, K.C., and *Hecksher* for the defendants.

SARGANT, J.—This is an action of rather an unusual character. It is first of all to declare that certain persons nominated by the plaintiffs, the British Murac Syndicate, Ltd., which I will refer to as "the syndicate," to sit on the board of the Alperton Rubber Co., Ltd., which I will refer to as the "Alperton company," have been duly appointed directors of the Alperton company. The plaintiffs also seek an injunction to restrain interference with the persons so nominated taking up their position as directors of the company, and they now ask also for an injunction to restrain the Alperton company from holding a meeting for the purpose of confirming a special resolution which has already been passed at a preliminary meeting for the purpose of blotting out from their articles of association an article which gives in terms the right to the syndicate to appoint two directors of the Alperton company.

The rights of the syndicate depend primarily on a sale agreement which was entered into between them and a trustee for the Alperton company on Mar. 24, 1910. That agreement was adopted in the usual way, and has become binding upon the Alperton company, who then had another name, the Crude Rubber Co. The agreement, after having been adopted, was carried out and completed by virtue of an assignment of May 26, 1910. Under that agreement there was a recital that the memorandum and articles of the Alperton company had been prepared with the privity of the syndicate and Mr. Dessau, who was an inventor and co-vendor with the syndicate. In those articles appears art. 88, under which the syndicate have the perpetual right of nominating two directors to sit on the board of the Alperton company. By an agreement that arrangement was confirmed in this language—it is cl. 10 of the agreement:

> "So long as the syndicate holds at least 5,000 shares in the capital of the company [I need hardly say that a large number of shares in the Alperton company were to be allotted to the syndicate as part performance of the purchase] the syndicate shall have the right of nominating two directors on the board of the company, such directors to obtain their qualification within one month after appointment."

So that under the agreement and articles the right of the syndicate exists. It is both a right under the agreement and it is a right under the articles in respect of a shareholding in the Alperton company. In that year two persons were appointed to be the nominees, and the nominee directors of the syndicate, and sat on the board, but they ceased to be directors some time in 1911. It appears that during the first part of the existence of the company very heavy losses were incurred. To some extent, at any rate, these losses were due to Mr. Dessau, who was the co-vendor to the company, and who appears to be an inventor of considerable ability, and possibly a better inventor than a man of business. It appears that the

patents which formed a part of the subject-matter assigned by Mr. Dessau and the syndicate to the Alperton company turned out to be of little, if any, value; and ultimately they were abandoned. Since then the company have begun to carry on a new policy and to desist from the patent business with which they started, and have entered upon, I am told, with some success, a manufacturing business which holds out, I am glad to think, considerable prospects of success. Mr. Dessau, who had been originally the manager of the company and afterwards its technical adviser, after a time ceased to hold that position. During 1914 the syndicate only exercised their power of appointing directors to the extent of nominating one director, a Dr. Thomson, and he appears to have worked in harmony with the other directors of the Alperton company. That appears from a speech made by the chairman of the company at the general meeting. As a matter of fact, he seems to have thought that he was rather worried by Mr. Dessau, and at one time, towards the end of 1914, he resigned his position as a director of the company. A considerable question of policy appears to have arisen at the board of the Alperton company whether they should continue their manufacturing business as their sole undertaking or whether they should take up a new invention which had been discovered by Mr. Dessau. On that there seems to have been an honest difference of opinion. The opinion that has prevailed down to the present has been in favour of continuing the manufacturing policy of the company and not taking up this special invention by Mr. Dessau, though down to the close of last year the opinion of the Alperton company seems rather to have been in favour of taking up this speciality of Mr. Dessau's.

Towards the end of 1914 the syndicate nominated Mr. Dessau as their second nominee on the board of the Alperton company. To that nomination objection was taken on behalf of the Alperton company and its directors. Accordingly the syndicate, acting, as it seems to me, with a good deal of consideration for the Alperton company, did not in any way press that nomination, and, as I understand, abandoned it, because on Mar. 3, 1915, the syndicate proceeded to nominate as their directors on the board of the Alperton company Dr. Thomson, who had, as I have mentioned, resigned his position as a director, and a Mr. Thomas Warwick, a person concerned in the manufacture of rubber goods. On that the Alperton company declined to accept the nomination of either of these two gentlemen on their board, and they called, in accordance with a requisition of a number of their shareholders, a meeting of the company to be held on Mar. 23 of this year. The object of that meeting was to pass a special resolution, to be confirmed by a subsequent meeting, for the purpose of cancelling art. 88 of the articles of association. That is the article which recognised the right of the syndicate to appoint the two directors of the Alperton company. It is conceded that the only business at that meeting was to be to cancel that article, because, although there are five or six other resolutions mentioned in the notice convening the meeting, they are admittedly merely consequential on the cancellation of that article—they are mere questions of drafting. In the circular which was sent of the formal notice of the meeting, after giving some account of the history of the company, the directors say this:

> "It is most detrimental to the business of this company to be under the necessity of appointing two additional directors nominated at any time by the British Murac Syndicate, Ltd., who may seek to alter the settled policy of the company."

Then later on in the same paragraph occurs this sentence:

> "Your directors feel strongly that the general body of shareholders should have the sole right of appointing their directors."

Therefore the sole and only object of the meeting as avowed was to get rid of the obligation resting on the Alperton company of accepting on their board the nominees of the syndicate; the object was to destroy the right of the syndicate to nominate two directors on the board. In that state of things the matter was

mentioned to me, I think, on the very morning when the meeting was to be held. I did not attempt to interfere with the meeting itself, because it was arranged very reasonably between those representing the plaintiffs and the defendants that the matter should be dealt with by me before the confirmatory meeting was held. The confirmatory meeting will be held, unless I restrain it, next week; and accordingly it is essential that I should give judgment at once.

There are one or two preliminary objections to the action which I will get rid of at once. In the first place counsel for the defendant, the Alperton company, attempted to make out a case that this was a question of specific performance, and that there had been a total or partial failure of consideration on the part of the syndicate; and that in view of the large losses which had been sustained by the company in their early operations and the entire worthlessness of the patents made over to them there was no case for specific performance. That is hardly more than verbal. There is no question really in this case of specific performance in the sense that that phrase is used at all. What I have to deal with is the specific enforcement of an obligation contained in an agreement which has in fact itself been kept. This is not a question of carrying out an executory agreement; so that the ordinary questions relative to specific performance do not arise at all. This is a mere question of enforcing a subsisting obligation, and the executory agreement has been carried out by the assignment of the patents. It would be perfectly impossible to consider the obligations at an end unless a clear and manifest case of fraud were made out on behalf of the defendant company. Of course no attempt has been made to do anything of that kind. It is observable that some time after all the facts were known to the defendant company they did determine not to give up the patents. That appears quite clearly from a letter or minute of the board of July 22, 1913. The defendant company then determined to retain the patents. Therefore, as far as specific performance in that sense is concerned, there is no ground at all to lead me to hold my hand.

There was one other point put forward which, again, is somewhat verbal, perhaps—namely, that under the article itself something further had to be done beyond the mere nomination of the two directors by the syndicate. In my opinion that is not so. I think that the true reading of the article is that when the syndicate formally nominate the persons they choose, those persons become directors then and there. It was suggested that co-operation on the part of the other directors might be necessary. I do not think so. In any case it is a mere formality, and the right of the syndicate to choose the two directors seems to me to be clear.

Having brushed aside those preliminary points I will deal with the two main objections of the defendant company which, as I understand them, are these. First, that the company cannot contract out of their inherent statutory power to alter their articles of association; the second objection is that the contract in question is a contract of the nature of a contract of service, and is therefore an obligation to enforce the specific performance of which would be contrary to the practice of the court.

With regard to the first point I am not really sure that it is very much more than verbal for this reason. As I understood counsel for the Alperton company, he did not contend that the alteration of the articles of association by the striking out of this art. 88 would, in fact, get rid of the right of the syndicate to nominate the directors and the obligation of the Alperton company to accept the directors. He took the view as I understand it that that right and obligation would subsist, and that, although the article might have gone, the syndicate would still be at liberty, by virtue of their contractual rights, to nominate the two directors and the Alperton company would still be bound to accept them; I mean, of course, apart from the second objection. Therefore there really does not seem to me to be very much in this objection. But it is said: "Well, at any rate, it does get rid of one fetter on the company"—namely, the fetter of complying with their obligations. The principal case on the subject is *Allen* v. *Gold Reefs of West Africa*,

Ltd. (1); but in that case the court seems to me to have quite clearly recognised that a company cannot alter its articles so as to commit a breach of contract, and that it might be that even the articles themselves might show that there was such a contract that it would be unfair for the company to alter. Here I have not to consider the question, because there is here both the provision in the articles and the express obligation in the contract under which the syndicate are to have this express right. It seems to me that the real gist of the decision in *Allen* v. *Gold Reefs of West Africa, Ltd.* (1) is to be found in the judgment of Lord Lindley, M.R. He says ([1900] 1 Ch. at p. 673):

> "But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered."

I think that clearly recognises that if the court sees that a contract involves as one of its terms that an article is not to be altered, then the company is not at liberty to alter its articles so as to break that contract. In my judgment, on the facts of the case the contract between the syndicate and the Alperton company clearly involved as one of its terms that art. 88 was not to be altered—that is, that the syndicate were to have a perpetual right of nominating two directors of the company.

It has been said that *Punt* v. *Simmons* (2) is an express authority in favour of the defendants' contention. I think, looking at the case, that it is an express authority in favour of that contention; but so far as this part of *Punt* v. *Simmons* (2) is concerned, it seems to me that it has been overruled by the decision of *Baily* v. *British Equitable Assurance Co.* (3), where the Court of Appeal considered, on the view which they took that there was a contract with the policy-holders of the company, that the full profits should be applied in declaring bonuses on the policies of the various holders, that on that view of the existence of the contract the company was disqualified from altering its articles so as to provide that a certain portion of the profits should be carried to a reserve fund. Although that decision was reversed by the House of Lords, it is clear to me that it was not reversed through any quarrel by the House of Lords with that principle. Indeed, they seem to me in their judgment to have recognised that principle. All that the House of Lords held was that, on the true interpretation of the bargain between the policy-holder and the company, there was, in fact, no contract between them that the allocation of the whole of the profits to the policies by way of bonus should be a perpetual arrangement. That is an authority clearly in favour of this, that a company may be restrained from altering articles for the purpose of committing a breach of a definite contract, one of the terms of which is that the articles shall not be altered.

Then comes the second objection—namely, that the contract under which the syndicate are to have the right of appointing two directors is in the nature of a contract of service, and accordingly that on the ordinary principles relating to those contracts the court will not specifically enforce the contract, will not compel one person to accept another as his servant. As regards that I feel great difficulty whether the relations between a company and a director is of the nature of a contract of service within the meaning of that doctrine at all. It appears, quite clearly from *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* (5) that the directors may have rights and powers and duties under the constitution of a company independently of the direction of a majority of the shareholders, that is,

to some extent they occupy an independent position. It is quite true that in *Bainbridge* v. *Smith* (4) the Court of Appeal declined to force by injunction a certain person on a company as a managing director in spite of the existence of a contract to that effect, but a managing director is to some extent in a different position from an ordinary director, because he is half director and half manager. Beyond that the question I am considering at the moment is not a question of whether a particular man shall be forced upon an unwilling company; but whether there is a general right on the part of the syndicate to nominate persons who shall be directors of the company. What the company are doing is trying to get rid altogether of a general right of nomination, not merely objecting to receiving in the capacity of director any particular individual. Everybody who has had anything to do with companies must know that arrangements of this kind, under which either preference shareholders or holders of debentures or other persons who have a permanent stake in a company have a right to appoint one or more directors of the company for the purpose no doubt of protecting their interests, are extremely common. This also is quite obvious, that to enforce an agreement of that kind merely by giving damages for the breach of it would be a wholly inadequate and illusory remedy. I am not going to be the first to hold here that an agreement for good consideration under which a shareholder in a company, whilst he holds his shares or a certain number of them, shall in virtue of that holding have the right of appointing or nominating a director of the company, is one that cannot be enforced by an injunction of this court. In my opinion the right is one which ought to be so enforced, and the enforcement of which by way of declaration or injunction is not in conflict with the ordinary rules against the specific performance of contracts of service.

It is not here as if the syndicate had had the power of nominating an absolute majority of the board of the company. To that there might possibly be objections, though I have not to deal with the matter now, inasmuch as it would be putting the control of the company in the power of an outsider. Here, all that is secured by the nomination of a director by the syndicate is that there shall be some person or persons on the board, not a majority of the board, and that accordingly the views advocated by the syndicate shall have expression on the board of the company. That being so, I think that I ought to accede to the claim of the plaintiffs by declaring that by virtue of the nomination made by them Dr. George Thomson and Mr. Thomas Warwick have become directors of the defendant company, and I think that I ought also to grant an injunction as I do to restrain the holding of the confirmatory meeting for the purpose of getting rid of art. 88 of the articles of association of the company.

I have to consider the question how far an injunction ought to be granted to compel the acceptance of Dr. Thomson and Mr. Warwick as members of the board. I think it is clear that although an outside body like the syndicate in this case may have the power of nominating two directors on a board, the court would not by injunction force the company to accept on this board powers who were unfit or thoroughly unacceptable as members of the board of the company. So far as unacceptability merely means that the persons nominated are persons who might be in sympathy with the general policy of the syndicate or with the general policy of Mr. Dessau, I do not think that of itself would be a proper reason of objection on the part of the company or the other directors. But I must deal with one or two further personal objections. As regards Dr. Thomson as far as I can see, there is no personal objection to him. It is acknowledged as a mere matter of personality that he is acceptable to the other directors; and not one word is said against him. I think he is a friend of Mr. Dessau; and it is said that Mr. Dessau is a gentleman of too speculative a turn of mind; and that he exercises too much influence on Dr. Thomson; and that Dr. Thomson accordingly is a dangerous director to have on the board of the Alperton company; or at any rate that he is a director who would always be opposing the views of the other directors of the company, and interfering with the settled policy which they have now adopted of continuing the process of manu-

facturing only. I can see no reason for taking that view. I have seen Dr. Thomson in the box. He does not strike me as a gentleman destitute of an individuality of his own. I think he is perfectly capable of resisting any undue blandishment on the part of Mr. Dessau, if there has been any such, which I have no reason to believe. Although, no doubt, if he sees an opportunity he may advocate the policy of taking up the more recent invention of Mr. Dessau, I feel perfectly certain that if he finds that the board have determined on a settled policy, he will do his best to give effect to that policy, and will not be perpetually drawing the suggested red herring across the trail. If he were alone concerned I should have no difficulty in forcing him if necessary upon the company and the other directors.

But as regards Mr. Warwick I do not think the matter is so clear. He undoubtedly is a manufacturer whose business is in competition, if not with the company with that of a great number of customers of the company, and I can understand that there may be reasonable objections to him in that capacity, and possibly in other capacities.

Accordingly counsel for the plaintiff syndicate has accepted the proposal which I have made on this part of the case. I do not propose at present, while making a declaration, to grant an injunction in support of it. I assume that the board of directors of the Alperton company will accept Dr. Thomson; and it will be quite unnecessary to proceed to enforce his position by way of injunction. On the other hand I propose, as was done in *Bainbridge* v. *Smith* (4), to wait and see whether the shareholders of the company who at present have only been trying to get rid of the general obligation towards the syndicate think it worth while to have a meeting called and to object to the personality of Mr. Warwick. If such a meeting is called and if his personality is objected to by the great majority of the shareholders, and on reasonable grounds, I should think it extremely likely that neither would Mr. Warwick desire to force himself upon the directors of the Alperton company, nor would the syndicate desire to assist him in doing so. It may well be, therefore, that the matter will adjust itself. I hope that the parties will show themselves reasonable towards each other with regard to this matter. Therefore for the moment I shall wait and see whether any necessity arises for granting an injunction. I propose to give liberty to apply for an injunction generally without, of course, embodying in that liberty any special directions or indications.

I think I ought to say this. Counsel for the Alperton company rather suggested that if the declaration was made that these two gentlemen were directors of the company, the company might proceed at once under one of their articles—art. 100—by extraordinary resolution to remove the directors from their office. Perhaps that was only said in the heat of argument. I cannot imagine that the company, having regard to the respect which is ordinarily shown to the decisions of the court, would desire to make use of art. 100 in such a way for a purpose for which I do not think it can possibly have been inserted in the articles of association. If my judgment against the company is wrong they have the usual facilities for setting it right elsewhere; but while the judgment stands I feel quite sure that the company at a meeting will not endeavour to get rid of the effect of the judgment by any such machinery as is suggested. Therefore the judgment will be in the terms that I have stated; I must give the plaintiffs the cost of the action; but I propose only to give the costs of the action against the Alperton Rubber Co., Ltd.; I see no reason for giving costs against the directors.

Solicitors: *Lumley & Lumley*; *Jenkins, Baker, Reynolds & Co.*

[*Reported by* T. DE LA POER BERESFORD, ESQ., *Barrister-at-Law.*]

Re RAVEN. SPENCER *v.* NATIONAL ASSOCIATION FOR THE PREVENTION OF CONSUMPTION AND OTHER FORMS OF TUBERCULOSIS, AND ANOTHER

[CHANCERY DIVISION (Warrington, J.), March 5, 1915]

[Reported [1915] 1 Ch. 673; 84 L.J.Ch. 489; 113 L.T. 131]

Charity—Charitable bequest—Direction that trustees' decision on identity of beneficiary to be final—Legacy to named association—Extrinsic evidence of testator's intention to benefit particular branch of the association—Admissibility.

The testator, among other charitable bequests, bequeathed £1,000 to the "National Association for the Prevention of Consumption." The will directed that in case of doubt the trustees should decide the identity of the institution intended to benefit, and their decision "shall be final and binding on all parties." The association's full title was the National Association for the Prevention of Consumption and other forms of Tuberculosis. Its head office was in London, but it had a branch in Leicester where the testator resided, and the testator was a life member of the Leicester branch and had contributed to its funds. In view of extrinsic evidence of the testator's intention the trustees decided to pay the legacy to the branch, but the association desired the decision of the court on the identity of the institution intended to benefit.

Held: the association, not the branch, was entitled to the legacy, since (i) the direction in the will that the decision of the trustees should be final was void and inoperative because it purported to oust the jurisdiction of the courts; and (ii) the association was correctly described in the will and therefore extrinsic evidence of the testator's intention was inadmissible.

Notes. As to the court's functions in construction of wills, see 34 HALSBURY'S LAWS (2nd Edn.) 158 et seq.; as to the admissibility of evidence for the purpose of identification, see ibid., at p. 170 et seq. For cases on the admissibility of extrinsic evidence, see 44 DIGEST 614 et seq.

Case referred to:

(1) *Massy* v. *Rogers* (1883), 11 L.R.Ir. 409; 44 Digest 533, b.

Also referred to in argument:

Charter v. *Charter* (1874), L.R. 7 H.L. 364; 43 L.J.P. & M. 73, H.L.; 44 Digest 615, *4432*.

Re Thompson, [1910] V.L.R. 251.

National Society for the Prevention of Cruelty to Children v. *Scottish National Society for the Prevention of Cruelty to Children*, [1915] A.C. 207; 84 L.J.P.C. 29; 111 L.T. 869; 30 T.L.R. 657; 58 Sol. Jo. 720, H.L.; 44 Digest 827, *6786*.

Originating Summons.

By his will dated Sept. 29, 1911, the testator, William Raven, bequeathed among other legacies to charities the sum of £1,000 free of all duties to the "National Association for the Prevention of Consumption" (hereafter referred to as "the association") and directed that if any "doubt shall arise in any case as to the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties." The full title of the association was the National Association for the Prevention of Consumption and other forms of Tuberculosis and its head office was in London. The testator resided at Leicester and had been a life member of the Leicester and Leicestershire branch of the association; he had been particularly interested in that branch and had subscribed liberally to its funds; he had never subscribed to or had any connection with the association in London. On the trustees proposing to pay the legacy to the association in London the testator's family informed them that the

testator had intended to benefit the Leicester branch and that this could be confirmed by his medical adviser, Dr. Pratt, who also took a great interest in the Leicester branch and who had been largely instrumental in the granting of the legacy. In these circumstances the trustees proposed to pay the legacy to the Leicester branch. A

For the association it was submitted that the words "Leicester branch" must have been intentionally omitted from the legacy since in legacies to charities in Leicester immediately preceding and following the legacy in question the institutions had been fully described as, e.g., the "Leicester Infirmary" and the "Leicester and Leicestershire Maternity Hospital"; and it was further submitted that as the association was correctly described in the will it was entitled to the legacy and extrinsic evidence as to the testator's intention to benefit the Leicester branch was not admissible. Affidavits of the testator's intention were filed by Dr. Pratt, the testator's widow, and two of his friends, in support of the claim of the Leicester branch, and it was submitted in support of the claim that the provision in the will that the trustees' decision was to be final and binding was a valid condition and not contrary to public policy. B C

T. R. Hughes, K.C., and *Alfred Adams* for the trustees.

W. Coldridge, K.C., and *R. F. MacSwinney* for Dr. Pratt, claiming for the Leicester branch. D

Tomlin, K.C., and *J. W. Manning* for the association.

WARRINGTON, J.—In my opinion it is incompetent for a testator to give legal rights by giving a legacy and at the same time to say that those legal rights are to be determined by others and not by the ordinary tribunals. In that case the trustees might make the decision as they thought fit, and it is contrary to public policy to deprive persons of their right to resort to the ordinary tribunals. The opinion of CHATTERTON, V.C., in *Massy* v. *Rogers* (1) entirely agrees with mine. A legatee cannot be debarred from taking the opinion of the court, nor can the jurisdiction of the court be ousted, and it is for the court to decide who is entitled. In my opinion the direction was unlawful and inoperative. E F

As regards the identity of the legatee, I have no doubt that according to legal rules the legacy was given to the association and not to the branch. The testator seems to know nothing more than the name of the defendant association. Evidence of intention can only be admitted when the description applies indifferently to more than one society. In my opinion, the National Association are entitled to the legacy. Costs as between solicitor and client will be paid out of the residuary estate. G

Solicitors: *Hasties*; *Surr, Gribble & Co.*, for *Toller, Burgess & Pochin*, Leicester.

Order accordingly.

[*Reported by* W. H. TRUELOVE, ESQ., *Barrister-at-Law.*]

SHARPNESS NEW DOCKS AND GLOUCESTER AND BIRMINGHAM NAVIGATION CO. *v.* ATTORNEY-GENERAL

[HOUSE OF LORDS (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor), December 15, 16, 1914, February 19, 1915]

[Reported [1915] A.C. 654; 84 L.J.K.B. 907; 112 L.T. 826; 79 J.P. 305; 31 T.L.R. 254; 59 Sol. Jo. 381; 13 L.G.R. 563]

Bridge—Repair—Statutory obligation to keep bridge over canal "in sufficient repair"—Standard of repair required—Increase in volume of traffic—Worcester and Birmingham Canal Act, 1791 (31 *Geo.* 3, *c.* 59), *s.* 61.

By the Worcester and Birmingham Canal Act, 1791, a company of proprietors were empowered to make a canal, which was constructed in or about 1812, subject to the condition, contained in s. 61 of the Act, that the company should not make the canal across any highway "until they have made and perfected such bridges . . . across such highway . . . of such dimensions and in such manner as the commissioners [appointed under the Act] . . . shall adjudge proper and all such . . . bridges . . . to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company."

Held: on the true construction of s. 61 the words "and all such . . . bridges . . . shall from time to time be supported, maintained, and kept in sufficient repair" by the company must be considered with reference to the class of traffic on the highways when the bridges were built, and did not impose an obligation on the canal company, or the appellants as their successors, to maintain and keep up such bridges in a condition to carry the increased volume of traffic existing in 1915.

Decision of Court of Appeal, [1914] 3 K.B. 1, reversed.

R. v. *Kerrison* (1) (1815), 3 M. & S. 526, distinguished.

Dictum of FLETCHER MOULTON, L.J., in *Hertfordshire County Council* v. *Great Eastern Railway* (2), [1909] 2 K.B. at p. 412, discussed.

Notes. Applied: *A.-G.* v. *Great Northern Railway*, [1916–17] All E.R.Rep. 272; *A.G. for Ireland* v. *Lagan Navigation Co.*, [1924] A.C. 877; *Manchester Corpn.* v. *Audenshaw Urban Council and Denton Urban Council*, [1928] All E.R.Rep. 314. Considered: *London and North Eastern Rail. Co.* v. *North Riding of Yorkshire County Council*, [1936] 1 All E.R. 692. Referred: *Worsborough Urban Council* v. *Barnsley British Co-operative Society* (1914), 111 L.T. 429; *Butt* v. *Weston-Super-Mare Urban Council*, [1922] All E.R.Rep. 469; *Welden* v. *Smith*, [1924] A.C. 484; *Swain* v. *Southern Rail. Co.*, [1938] 3 All E.R. 705; *Railway Executive* v. *Yorkshire (West Riding) County Council*, [1949] 1 All E.R. 836.

As to liability of individuals to maintain bridges across highways, see 19 HALSBURY'S LAWS (3rd Edn.) 470–477; and for cases see 26 DIGEST (Repl.) 643 et seq.

Cases referred to:

(1) *R.* v. *Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; 26 Digest (Repl.) 646, *2921*.

(2) *Hertfordshire County Council* v. *Great Eastern Railway*, [1909] 2 K.B. 403; 78 L.J.K.B. 1076; 101 L.T. 213; 73 J.P. 353; 25 T.L.R. 573; 53 Sol. Jo. 575; 7 L.G.R. 1006, C.A.; 26 Digest (Repl.) 654, *2990*.

(3) *Macclesfield Corpn.* v. *Great Central Rail. Co.*, [1911] 2 K.B. 528; 80 L.J.K.B. 884; 104 L.T. 728; 75 J.P. 369; 9 L.G.R. 682, C.A.; 26 Digest (Repl.) 647, *2922*.

(4) *R.* v. *Inhabitants of Kent* (1811), 13 East, 220; 104 E.R. 354; 38 Digest (Repl.) 442, *944*.

(5) *R.* v. *Inhabitants of Lindsey* (1811), 14 East, 317; 104 E.R. 623; 26 Digest (Repl.) 646, *2920.*

(6) *R.* v. *Inhabitants of Ely, Old Bedford Bridge and New Bedford Bridge Cases* (1850), 15 Q.B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L.J.M.C. 223; 15 L.T.O.S. 412; 14 J.P. 512; 14 Jur. 956; 4 Cox, C.C. 281; 117 E.R. 671; 26 Digest (Repl.) 646, *2913.*

(7) *West Lancashire Rural District Council* v. *Lancashire and Yorkshire Rail. Co.*, [1903] 2 K.B. 394; 72 L.J.K.B. 675; 89 L.T. 139; 67 J.P. 410; 51 W.R. 694; 19 T.L.R. 625; 47 Sol. Jo. 693; 1 L.G.R. 788; 38 Digest (Repl.) 321, *205.*

(8) *Chichester Corpn.* v. *Foster*, [1906] 1 K.B. 167; 75 L.J.K.B. 33; 93 L.T. 750; 70 J.P. 73; 54 W.R. 199; 22 T.L.R. 18; 14 L.G.R. 205, D.C.; 26 Digest (Repl.) 492, *1771.*

(9) *Burgess* v. *Northwich Local Board* (1880), 6 Q.B.D. 264; 50 L.J.Q.B. 219; 44 L.T. 154; 45 J.P. 256; 29 W.R. 931, D.C.; 26 Digest (Repl.) 352, *673.*

Also referred to in argument:

R. v. *Inhabitants of Devon* (1825), 4 B. & C. 670; 7 Dow. & Ry.K.B. 147; 3 Dow. & Ry.M.C. 346; 4 L.J.O.S.K.B. 34; 107 E.R. 1210; 26 Digest (Repl.) 652, *2971.*

R. v. *Inhabitants of Surrey* (1810), 2 Camp. 455; 26 Digest (Repl.) 639, *2864.*

A.-G. (*Pickford, Ltd.*) v. *Great Northern Railway* (1914), 83 L.J.Ch. 763; 12 L.G.R. 1196; 58 Sol. Jo. 595; 30 T.L.R. 557; on appeal 84 L.J.Ch. 793; 31 T.L.R. 501; 59 Sol. Jo. 578; 80 J.P. 9; [1915] W.N. 263; 13 L.G.R. 998; affirmed, [1916] 2 A.C. 356; 85 L.J.Ch. 717; 115 L.T. 235; 80 J.P. 337; 32 T.L.R. 674; 60 Sol. Jo. 665; 14 L.G.R. 997, H.L.; 26 Digest (Repl.) 648, *2928.*

R. v. *Inhabitants of Henley* (1847), 2 New Mag. Cas. 354; 10 L.T.O.S. 110; 2 Cox, C.C. 334; 11 J.P.Jo. 804; 26 Digest (Repl.) 382, *914.*

Birmingham Canal Navigation Co. Proprietors v. *Hickman* (1892), 56 J.P. 598; 8 T.L.R. 407, C.A.; 38 Digest (Repl.) 441, *942.*

Chamber Colliery Co. v. *Rochdale Canal Co.*, [1895] A.C. 564; 64 L.J.Q.B. 645; 11 T.L.R. 544; 11 R. 264, H.L.; 11 Digest (Repl.) 171, *414.*

Caledonian Railway v. *Glasgow Corpn.*, [1909] A.C. 138; 78 L.J.P.C. 52; 99 L.T. 784, H.L.; 38 Digest (Repl.) 314, *155.*

R. v. East and West India Dock Co. (1888), 60 L.T. 232; 53 J.P. 277; sub nom. Re East and West India Dock Co., 5 T.L.R. 151, D.C.; 26 Digest (Repl.) 647, *2924.*

Appeal by the Sharpness New Docks & Gloucester & Birmingham Navigation Co., defendants in the action, from an order of the Court of Appeal, [1914] 3 K.B. 1, which varied a judgment of PHILLIMORE, J., reported, [1913] 1 K.B. 422.

On Aug. 14, 1911, a writ was issued at the suit of the Attorney-General (at the relation of the mayor, aldermen, and citizens of the city of Worcester, the respondents in this House, against the appellants claiming (i) a declaration that the appellants were liable to support, maintain, and keep in repair certain bridges therein mentioned within the city of Worcester which carried the several common highways over the appellants' canal within the city sufficient to bear the ordinary traffic of the district and the traffic which might reasonably be expected to pass along the highways carried over the canal by the said bridges, having regard to the present character and needs of the district served by the highways; and (ii) an injunction restraining the appellants, their servants, and agents from allowing the said bridges and each of them, other than Sidbury Bridge, to remain in such a condition as to hinder or endanger His Majesty's subjects passing and repassing over and along the said highways and bridges with the ordinary traffic of the district, which might reasonably be expected to pass and repass over the same, and requiring the appellants forthwith to support, maintain, and keep in sufficient repair the said bridges and each of them. PHILLIMORE, J., held that the

company were only liable to keep the bridges in repair so as to be sufficient, having regard to their original construction to bear such traffic as was then ordinarily on such highways. The Court of Appeal (VAUGHAN WILLIAMS, KENNEDY and SWINFEN EADY, L.JJ.) allowed an appeal by the plaintiff and ordered that the judgment of PHILLIMORE, J., should be varied by declaring that the defendants were liable to support, maintain, and keep in repair each of the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic existing at the present time, and directed that the taxed costs should be paid by the defendants to the plaintiff. The defendants appealed.

Sir Robert Finlay, K.C. (*Macmorran, K.C.*, and *E. W. Cave* with him), for the appellants.

Cave, K.C., and *J. B. Matthews, K.C.* (*W. W. Mackenzie, K.C.*, with them), for the respondent.

Their Lordships took time for consideration.

Feb. 19, 1915. The following opinions were read.

VISCOUNT HALDANE, L.C.—About 1812 a canal company, who were the predecessors in title of the appellants (bound by the obligation of the company), constructed certain bridges over a canal which extended from Birmingham to Worcester. These bridges formed part of works undertaken with the powers conferred by the Worcester & Birmingham Canal Act, 1791 (31 Geo. 3, c. 59). This Act authorised the construction of the canal itself, and provided by s. 61 that the company should, among other things, make and from time to time maintain and support such bridges, arches, culverts, drains, and passages over, under, by the side of, or into the canal as certain commissioners should determine. The section further enacted that the company should not

> "make the said canal . . . across any common highway . . . until they should have made and perfected such bridges . . . across such highway . . . of such dimensions and in such manner as the commissioners . . . shall adjudge proper and all such . . . bridges . . . to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company."

The bridges were constructed in a fashion approved and adjudged proper by the commissioners. The question which arises in this appeal may be shortly stated. Since 1812 the ordinary traffic which might be expected to pass along the highways and cross the bridges has become materially heavier, and of this traffic there is some which the bridges will not bear unless they are reconstructed. The Court of Appeal decided that the appellants were liable to repair the bridges in such a way that they should be sufficient to bear the ordinary traffic which might, at the present time, be reasonably expected to pass along the highways carried by them over the canal—a conclusion which might obviously necessitate reconstruction. In so deciding they differed from PHILLIMORE, J., who had held that the obligation was limited to keeping the bridges in such a condition that they could bear the traffic which might have been expected to pass over them in 1812, the date when they were made. The question is, therefore, whether the statute has imposed an obligation to reconstruct the bridges from time to time so as to bear traffic which, though ordinary, is progressively including heavier vehicles.

This question depends exclusively on s. 61, and to the language of that section I therefore turn. I do not think that the words "supported" and "maintained" add anything to the effect of the expression "kept in sufficient repair." Now it is to be observed that what are to be kept in sufficient repair mean such bridges as were approved by the commissioners. In my opinion, this language, so far as the natural meaning of the words goes, prescribes unambiguously the extent of the obligation to keep in repair. It appears to me to stop short of imposing on the appellants an obligation to reconstruct so as to provide bridges of a standard

higher than that which the commissioners have prescribed. When they had certified what was to be perfected and made they were primâ facie functi officio. It will be observed that they are given no powers as regards maintenance, support, or repair, their supervision being confined to the original construction. Such, to my mind, is the natural import of the section, and unless there is some principle of law which directs that the language is to be read as implying something that is not expressed, that is what the meaning ought to be taken to be. Authorities were cited at the Bar in support of the proposition that a duty such as is contended for by the respondent ought to be implied, and among these authorities we were referred to *R.* v. *Kerrison* (1). There undertakers were authorised by statute to make a river navigable, and to cut the soil belonging to other persons in order to make a new channel, or other things necessary for making the river navigable. Substantially nothing further was said in the statute. The undertakers, in the execution of these powers, built a bridge over which they carried the highway, and for some time they repaired the bridge. Later on they contested their liability to do so. They were indicted in consequence, and the Court of King's Bench—Ellenborough, C.J., and Le Blanc and Bayley, JJ.—held that the indictment would lie, for the words of the statute conferred on the undertakers a power to cut the highway only upon an implied condition that an adequate means of passage was substituted for the benefit of the public. The words of the statute interpreted there were very different from the words we have to deal with. They prescribed nothing about liability to repair, and left the question where the liability was to fall to be determined by implication. In the case before us this is otherwise. Section 61 contains a set of provisions which appear on their face to be intended as exhaustive.

Under these circumstances I see no reason for departing from, or adding to, the natural meaning of the language. Authorities in cases of construction of statutes of this nature can rarely be of much value. The statutes, the language of which has to be construed, vary in expression, and, as they must be read as a whole, the materials for answering questions of interpretation ought primarily to be sought for within the four corners of the Act of Parliament, and not in what judges, however eminent, have said about other statutes, the language of which is different, or about the common law, which is superseded by the code expressed. It may be that, as was said by Fletcher Moulton, L.J., in *Hertfordshire County Council* v. *Great Eastern Railway* (2), [1909] 2 K.B. at p. 412, where persons acting under statutory authority interrupt a highway they must, if nothing to the contrary is enacted, construct such works as will restore to the public its use, and maintain these works, unless the statute provides otherwise. But this does not touch the question in the present case, which is, there being a provision in the statute, what obligation its words impose. Nor does the other recent authority cited, *Macclesfield Corpn.* v. *Great Central Rail. Co.* (3), carry the matter further. The point there turned on words in a statute which differed materially from those before us. The Court of Appeal seem to have thought that the obligation under these words to maintain and repair might have imposed an obligation to make new works, by analogy to the general obligation of the county authority to keep a highway in such a condition that it could carry not only the traffic of the period at which it was made, but heavier traffic coming into existence subsequently. But s. 61 of the Act which we have to construe in the present case does not appear to me to admit of resort to any presumption of intention based on the analogy of the common law. It contains a code, so far complete in itself, and it is self-contained.

I am, therefore, of opinion that the judgment of the Court of Appeal was wrong, and ought to be reversed. The declaration to be substituted for that contained in the order complained of should not, however, be in the form adopted by Phillimore, J. I think that his order should be varied by directing that the appellants are liable to support, maintain, and keep in repair each of the bridges (reserving Lowesmoor Bridge for further consideration) in the condition in which

it was made and perfected, in accordance with the adjudication of the commissioners, and that the bridges, as made in 1812, ought to be presumed to have satisfied the requirements which the commissioners made. As this variation does not substantially modify the result of this appeal, the appellants (there having been no costs given at the trial) are entitled to their costs here and in the Court of Appeal. I move accordingly.

LORD DUNEDIN.—I concur, and as to the construction of this statute have nothing to add. I wish, however, to state explicitly my opinion that the whole question necessarily depends upon the proper construction of the statute; and that where the statute deals with the subject its provisions form a code on that subject, and cannot be added to by what has been called a common law doctrine.

I am unable to agree with the dictum of FLETCHER MOULTON, L.J., in *Hertfordshire County Council* v. *Great Eastern Railway* (2), ([1909] 2 K.B. at p. 412) which is approved of in the judgments in the Court of Appeal in this case, and which, in my opinion, is too broadly expressed, as it would import a common law obligation running side by side with the expressed statutory obligations. The dictum is founded on the four cases of *R.* v. *Inhabitants of Kent* (4), *R.* v. *Inhabitants of Lindsey* (5), *R.* v. *Kerrison* (1) and *R.* v. *Inhabitants of Ely* (6). Now, *R.* v. *Inhabitants of Kent* (4), if looked into, will be found to be based upon an obligation extracted by construction from the words of the statute. The point of the judgment is thus put by LORD ELLENBOROUGH, C.J. (13 East at *226):

> "Here the statute gives power to the company to alter the old highways for their own purposes, upon condition of leaving another passage as convenient in room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition."

That case is, therefore, no authority for the proposition. *R. v. Inhabitants of Lindsey* (5) only decided that the county was not liable to maintain the bridge in question; but so far from imposing liability on the canal company, it expressly points out that the company might discontinue the bridge. There remain *R.* v. *Kerrison* (1) and *R.* v. *Inhabitants of Ely* (6), and it is true that in neither of them was reliance placed on a clause of the statute enjoining anything on the parties who had made the bridge. In neither case, however, was there a specific statutory authorisation to make the bridge. In *Kerrison's Case* (1) the power was merely to straighten a river and cut new channels. A new channel had intercepted a highway, and a bridge had been made and continuously repaired by the undertakers since 1695. The court in 1815 held that they must still go on repairing it. In *R.* v. *Inhabitants of Ely* (6) the bridge was originally constructed by adventurers without any Act of Parliament soon after 1630, though their undertaking was in 1663 vested by Act of Parliament in a corporation. The judgment really followed *R.* v. *Kerrison* (1).

I am not doubting the authority of these two cases. But it seems to me a perfectly different thing to come to the conclusion that when, without special statutory authority, there has been made an obstruction to a public road, which obstruction has been obviated by means of a bridge, then the right of the undertakers to continue the obstruction is conditional upon its maintaining the bridge, and to raise up a so-called common law doctrine of repair where the work in question is specifically allowed by statute, and when the statute itself in a clause or clauses expresses the conditions under which the work may be done. Authorisation by statute to do a particular thing makes that thing, when done, a legal act, and imposes no liability. This has often been held, as in a question with private individuals—e.g., in the cases as to sparks from locomotives and vibration caused by trains, and I see no reason why the principle is not equally sound in the case of a public right, and when the statute which authorises goes on to provide what are to be the rights and obligations flowing from the execution of the statutory act, it is in it and it alone that rights and remedies must be found. I think the right view was taken by WRIGHT, J., in *West Lancashire Rural District*

Council v. *Lancashire and Yorkshire Rail. Co.* (7), where in a case which fell under the Railways Clauses Act, 1845, he treated the question as depending entirely on the true construction of the sections of that statute.

LORD ATKINSON.—In the argument of this appeal many authorities were cited to establish that it is the duty of road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repairs of the highway alter to suit the change. No person really contests that principle. It was further argued that where a canal or railway is cut through a highway, removing a piece of it, and those who do this are required to provide, in the shape of the roadway over a bridge, a new piece of highway as a substitute for the portion of the old so cut away, all the duties of maintenance and repair imposed by law on the road authority in reference to the old highway are imposed, at least primâ facie, upon the body having authority over the substituted highway, and, just as the road authority would have been bound to keep the old piece of road fit for ordinary traffic, however increased or altered in character, so must the bridge authority keep their structure fit for the increased or altered ordinary traffic. It is not disputed that the road authority cannot widen one of the public highways.

In my view, little assistance can be obtained from the discussion of these general principles towards the solution of the question to be decided in this case. One must look first, and I think I might almost say look last, at the provisions of the statute under which were built the bridges in reference to which the dispute arises. Upon those provisions, which are in themselves complete, the decision must depend. The statute is the Worcester and Birmingham Canal Act, 1791. Section 61 is the important section. It prescribes that the company of proprietors therein mentioned

> "shall make, erect, and set up and from time to time maintain and support such bridges, culverts, drains, and passages over, under, by the side of, or into the said canal, and the trenches and aqueducts communicating therewith, and the towing paths on the sides thereof of such dimensions and in such manner as the commissioners [i.e., the commissioners named in the Act] shall from time to time judge necessary and appoint."

The commissioners are thus made the judges of the dimensions of those bridges which they consider it is necessary to construct, and the manner in which they are to be constructed. The further duty imposed upon them in this part of the section is, from time to time, to maintain and support the works—the bridges among them—which they shall have so made, erected, or set up. No duty is cast upon them in this part of the section to maintain any bridges other than those they have so erected. It is not to be assumed that when they "appointed" the bridges to be erected they did not do their duty, or did not to some extent contemplate an increase of the ordinary traffic, but it could not, I think, be supposed that they could have contemplated its alteration in character in the extraordinary way it has altered in recent years. The section proceeds to enact that the Company of Proprietors shall not make the canal or any trench in or across any common, highway, public bridge-way, or footpath, unless they shall have made and perfected such bridges, passages, and arches across such highway, bridge-way, or path, and of such dimensions and in such manner as the said commissioners shall deem proper. This provision was obviously directed to secure that the public should not be put to the inconvenience of having their common highway or public bridle-way or footpath intersected until the substituted way had been provided. The commissioners are again made the absolute judges of the proper dimensions, and the proper manner of construction, of these bridges, and then the section proceeds to deal, not merely with the bridges, passages, and arches to be built across the highway, bridle-path, or foot-ways, but in addition with the works and conveniences, including bridges, mentioned in the earlier

portion of the section. It enacts that all such gates, stiles, bridges, arches, and other works and conveniences to be made shall from time to time "be supported, maintained, and kept in sufficient repair."

If one asks oneself the question, What in relation to the crossing of the old highway where the canal is cut are the structures which are to be supported, maintained, and kept in good condition, surely the answer must be those particular bridges, passages, and arches which were built by the Company of Proprietors, of the dimensions and in the manner adjudged proper by the commissioners, and not bridges, passages, and arches not built by this company at all, but from time to time by their successors long afterwards. The identity of the work approved by the commissioners must, I think, be preserved. I cannot think the words "supported, maintained, and kept in sufficient repair" can be stretched to cover reconstruction in whole or in part so as to make the bridges so built and perfected something different from what they were left when finished according to the directions of the commission. Restoration so as to make them as near what they were when built as time, wear, and the elements will permit, are, in my view, the very utmost that can be required from the appellants, the successors of the builders. I concur with my noble and learned friend, LORD DUNEDIN, in the criticism of the several authorities cited in argument. I do not think, therefore, that the Attorney-General is entitled to either of the wide declarations he asked for. I agree with the order which has been suggested by my noble and learned friend on the Woolsack.

LORD PARKER.—So far as the result of this appeal depends only on the true construction of the Worcester and Birmingham Canal Act, 1791, the appellants are, in my opinion, entitled to succeed. That Act defined the conditions upon which the canal company might construct the canal across a common highway. It might do so if it carried the highway over the canal by a bridge the size and strength of which was to be determined by certain commissioners appointed by the Act, and every such bridge when completed was from time to time to be supported, maintained, and kept in sufficient repair by the company. The company, under the powers of the Act, constructed the canal across certain highways, carrying the highways over the canal by means of bridges which (as must be assumed after this lapse of time) were of the size and strength determined by the commissioners. In determining such size and strength the commissioners would, of course, be bound to take into account the requirements of the ordinary traffic which might be expected to pass over the bridges, but there was nothing to prevent them from taking into account also the possible or probable increase in the dimensions and weight of the vehicles then in use, and for all that is known they may have done so. It was clearly their duty to uphold the public interests as against those of the canal company.

Since these bridges were built the traffic which may reasonably be expected to pass over the highways in question has become considerably heavier, by reason of the introduction of mechanical traction, and it is doubtful how far the bridges are of sufficient strength to bear this heavier traffic. The respondents contend that the company's obligation to maintain and support the bridges, and keep them in sufficient repair, involves an obligation to strengthen them as occasion may require, so that they will at all times be adequate to the ordinary traffic which may reasonably be expected to pass along the highways, however such traffic may increase in weight, and even though this obligation may involve pulling down and rebuilding the fabric itself. In my opinion, this contention cannot be upheld. What the company has to support, maintain, and keep in repair is in each case the fabric of the particular bridge, the size and strength of which were originally determined by the commissioners appointed by the Act, and there is, I think, no principle of construction by which an obligation to maintain, support, and repair a particular fabric can be enlarged into an obligation to reconstruct or rebuild the fabric in such a way that it is materially different in strength, size, or

otherwise from the particular fabric the subject of the obligation. The standard by which the obligation is to be judged is neither the ordinary traffic when the canal was constructed nor the ordinary traffic of to-day, but the bridge itself as determined by the commissioners under the Act.

The respondent relied on the common law principle laid down in *R.* v. *Kerrison* (1) and other cases, and recently acted upon by the Court of Appeal in *Hertfordshire County Council* v. *Great Eastern Railway* (2). This principle is stated by FLETCHER MOULTON, L.J., in the last-mentioned case as follows ([1909] 2 K.B. at p. 412):

> "Where persons, acting under statutory authority, for their own purposes, interrupt a highway by some work which renders it impossible for the public to use it, an obligation is primâ facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and the obligation so imposed is of a continuing nature, involving, not only the construction of such works, but also their maintenance."

It was contended that on this principle the company's obligations were not only those expressly imposed by the Act, but included a common law obligation under which it was bound from time to time to construct and maintain such bridges as would afford the public the same facilities for traffic which would have been enjoyed if the canal had never been carried across the highways in question. For the reasons stated by the LORD CHANCELLOR, I think this contention fails. It is one thing to rely on a common law principle where a statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or in addition to the obligations which are defined by the statute as those subject to which a company may interfere with a highway. In my opinion, therefore, the appeal should be allowed, and I am content with the order proposed by the LORD CHANCELLOR.

LORD PARMOOR.—The appellants are successors of the Company of Proprietors of the Worcester and Birmingham Canal Navigation, who, under the provisions of the Worcester and Birmingham Canal Act, 1791, constructed certain canal bridges and other works now vested in the appellants, subject to the same obligations and liabilities as those imposed upon the said Company of Proprietors. The question raised is as to the standard of liability in supporting and maintaining in sufficient repair certain canal bridges constructed to make communication between the severed portions of certain highways within the city of Worcester. The Court of Appeal are determined that the appellants are liable to support, maintain, and keep in repair the said bridges (reserving Lowesmoor Bridge) sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass along the highway carried over the appellant's canal. It was argued on the appeal to this House that the appellants are only bound to support, maintain, and keep under sufficient repair the bridges constructed by their predecessors with the sanction and approval of the commissioners appointed under the said Act, and that they are not bound to support or reconstruct such bridges so as to enable them to carry an increased weight of traffic, though such traffic might from time to time, as conditions change, be reasonably expected to pass along the highway.

The question is simply one of the construction of s. 61 of the said Act. This section deals with three different subject-matters: (i) That the towing path shall be fenced off; (ii) that certain accommodation works shall be constructed; (iii) that the said Company of Proprietors shall not make the canal or any trench in or across any public highway until they shall have made and perfected such bridges across such highway, and of such dimensions, and in such manner, as the said commissioners shall adjudge proper, and that such bridges shall from time to time be supported, maintained, and kept in sufficient repair by the said Company of Proprietors. It is admitted, for the purpose of the case, that the bridges

in question were originally made in accordance with the provisions of the said Act, and were approved and adjudged proper by the commissioners. What is the standard of liability placed upon the appellants to support, maintain, and keep these bridges in sufficient repair? I can find no difficulty in the language of the section, giving to the words their ordinary meaning. It appears to me quite clear that the standard of support, maintenance, or repair is fixed, not in relation to the changing conditions of traffic, but to the character and strength of the structure as ordered and approved by the commissioners. It is a fixed standard, not a mutable one varying with the requirements of the traffic from time to time. In argument on behalf of the respondent, counsel relied on three points: First, that the word "supported" implied more than the word "maintained," and placed an obligation upon the defendants to reconstruct a bridge not sufficiently strong to carry traffic which might reasonably be expected from time to time to pass along the highway on either side of any one of the bridges; secondly, that the word "sufficient" implied sufficiency for such traffic; thirdly, that in Acts of this character, which legalise the severance of a public highway, there is a presumption that the liability to support, maintain, and repair the substituted means of communication is the same as attaches to the road authority in respect of the severed portions of the highway.

As to points (i) and (ii), I am unable to hold that an obligation to support and keep in sufficient repair a particular bridge can be construed as an obligation to reconstruct the bridge on a different scale, or of a different strength and character. The main argument on which reliance was placed is that the appellants are, by presumption or implication, under the same obligation as the road authority, although no such obligation is expressly imposed. The respondent mainly relies on the obligation of a road authority to keep the roads, as dedicated to the public, in a reasonably fit state to bear the ordinary traffic of the district which may reasonably be expected to come upon them: *Chichester Corpn.* v. *Foster* (8); *Burgess* v. *Northwich Local Board* (9) Q.B. Div. 264; *Hertfordshire County Council* v. *Great Eastern Railway* (2). The last-named case contains a sufficient reference to the earlier authorities. In my opinion, it gives no support to the contention raised on behalf of the respondent. It not inaptly illustrates the difference between making a presumption where the statute is silent, and making a presumption where the nature and extent of the obligation are expressly defined in the terms of the statute. It was held that where there is a duty on a railway company to make some means of communication for the purpose of restoring the continuity of a severed highway, there is also invoked a duty to keep in repair the substituted work, although there are no express words imposing the obligation in the statute. FLETCHER MOULTON, L.J., in his judgment expresses the opinion that to get rid of this presumption the company which has been authorised to sever a highway must show that the statute which legalised the severance contains some provisions amounting to an exemption from such an obligation, and that it is not enough that the statute is silent on the point. In the present case the statute is not silent either as to the nature of the substituted works or as to the obligation of the appellants to keep them in repair. The nature and strength of the substituted works are determined by the commissioners, and the obligation is to support and maintain in sufficient repair such works. To make a presumption such as was made in *Hertfordshire County Council* v. *Great Eastern Railway* (2) would be setting aside the statutory obligation and substituting a different one in its place. The substituted obligation would not only be different from that imposed by the statute, but under certain conditions inconsistent with it. It is not unreasonable to suppose that the commissioners directed bridges to be constructed with a margin of strength beyond what was necessary for the traffic which might at that date have been reasonably expected to pass over the severed highways, and so long as this margin was not exhausted the appellants would have been liable to fulfil their obligations of maintenance and repair, though the traffic was of an exceptional character and

in excess of what might reasonably have been expected at the time. It may be true that in more recent times the balance has turned the other way, but this is no reason for rescinding the clear words of a statute. If in the public interest a different standard of liability from that imposed by the Worcester and Birmingham Canal Act, 1791, has become more convenient, it is a question for Parliament whether such a different standard should be imposed, and at whose cost the necessary reconstruction should be carried out. The function of the courts is simply to construe a statute so as to give effect to the will of legislature, and in the present case the language used is free from any ambiguity. In my opinion, the appeal should be allowed with costs, and the order varied in the form approved by the Lord Chancellor.

Solicitors: *Burton, Yeates & Hart*, for *Johnson & Co.*, Birmingham; *Church, Rendell, Bird & Co.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

DIXON *v.* BROWN

[King's Bench Division (Ridley and Bray, JJ.), January 19, 21, 1915]

[Reported [1915] 2 K.B. 294; 84 L.J.K.B. 1248; 112 L.T. 1033]

County Court—Appeal to Court of Appeal—Claim for damages for tort not exceeding £20 and for injunction—Claim for injunction withdrawn—Right to appeal without leave against judgment for damages—County Courts Act, 1888 (51 *& 52 Vict., c.* 43), *s.* 120, *proviso.*

By the County Courts Act, 1888, s. 120, proviso: "There shall be no appeal in any action of . . . tort . . . where the . . . damage claimed does not exceed £20 . . . unless the judge . . . shall grant leave to appeal."

The plaintiff claimed in the county court £20 damages for trespass and an injunction. At the trial of the action the county court judge said that, although he thought there had been a trespass, he did not want to put the defendant to expense by granting an injunction, but would adjourn the case. Before the adjourned hearing, the plaintiff withdrew his claim to the injunction. The judge having given judgment for the plaintiff for £15 damages, the defendant appealed without having obtained leave.

Held: the proviso to s. 120 of the County Courts Act, 1888, did not apply where there was a claim for an injunction, but only where the claim was solely for debt or damages not exceeding £20; accordingly, the defendant could appeal without leave.

Notes. The County Court Act, 1888, s. 120, has been replaced by s. 108 of the County Courts Act, 1959.

Distinguished: *Brett* v. *Thrower*, [1945] 2 All E.R. 284.

As to appeals from a county court to the Court of Appeal, see 9 Halsbury's Laws (3rd Edn.) 320 et seq.; and for cases see 13 Digest (Repl.) 464 et seq. For the County Courts Act, 1959, s. 108, see 39 Halsbury's Statutes (2nd Edn.) 183.

Cases referred to in argument:

Brune v. *James*, [1898] 1 Q.B. 417; 67 L.J.Q.B. 283; 77 L.T. 802; 46 W.R. 257; 42 Sol. Jo. 214, D.C.; 13 Digest (Repl.) 464, *878.*

Dreesman v. *Harris* (1854), 9 Exch. 485; 18 J.P. 330; 156 E.R. 207; sub nom. *Harris and Taylor* v. *Dreesman*, 23 L.J.Ex. 210; 22 L.T.O.S. 246; 18 J.P. 458; 2 C.L.R. 498; 13 Digest (Repl.) 464, *872.*

Appeal by the defendant from Lancaster County Court.

The plaintiff claimed £20 damages for trespass in consequence of the defendant having wrongfully entered on the plaintiff's premises and erected a building on a party wall belonging to the plaintiff and defendant. The plaintiff also claimed a mandatory injunction to compel the defendant to remove the building. At the trial of the action the county court judge gave a judgment in which he said that, in the circumstances of the case, in his opinion the defendant had committed a trespass but that he never granted mandatory injunctions if he could help it and he did not propose to grant an injunction at present but to adjourn the case as he did not want to put the defendant to expense by granting an injunction. Before the adjourned hearing, the claim for the injunction was withdrawn and at the subsequent hearing the judge gave judgment for the plaintiff for £15.

The defendant appealed without having obtained leave of the county court judge and the plaintiff took the preliminary objection that no appeal lay without the leave of the judge as the plaintiff's claim did not exceed £20.

By the County Courts Act, 1888, s. 120:

"If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court; Provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed £20 . . . unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal."

Wingate-Saul for the plaintiff.

A. Neilson for the defendant.

RIDLEY, J.—We must overrule this objection and hear the appeal and hold that the proviso to s. 120 of the County Courts Act, 1888, does not apply where there is a claim for a mandatory injunction as in the present case. We think that the proviso only applies where the claim is solely one for debt or damages which does not exceed £20.

BRAY, J., concurred.

[The substantive appeal was then heard and a new trial ordered.]

Solicitors: *Rawle, Johnstone & Co.*, for *Whiteside & Knowles*, Morecambe; *W. P. Ellen* for *Richard Knight*, Morecambe.

[*Reported by* G. H. KNOTT, ESQ., *Barrister-at-Law.*]

HARRIS *v.* TAYLOR

[Court of Appeal (Buckley, Pickford and Bankes, L.JJ.), March 11, 12, 13, 1915]

[Reported [1915] 2 K.B. 580; 84 L.J.K.B. 1839; 113 L.T. 221]

Conflict of Laws—Foreign judgment—Enforcement—Voluntary submission to jurisdiction of foreign court—Conditional appearance—Motion to set aside writ.

The plaintiff and his wife were domiciled in the Isle of Man. The plaintiff brought an action against the defendant in the High Court in the Isle of Man for criminal conversation with his wife. As the defendant was not resident or domiciled in the Isle of Man, the plaintiff obtained leave to serve him out of the jurisdiction with the writ in the action, which was served in England. The defendant obtained leave to enter a "conditional" appearance to set aside the writ, and filed a motion in which he contended that there was no authorisation for service out of the jurisdiction of the Manx court, that no cause of action had arisen within the jurisdiction of the Manx court, and that the defendant was domiciled in England. This motion was dismissed. Subsequently the plaintiff, in the defendant's absence, obtained judgment for damages and costs. The plaintiff now sought to enforce the judgment of the High Court of the Isle of Man.

Held: the defendant, by his motion in the Isle of Man court, had voluntarily submitted to the jurisdiction of that court and the judgment was, therefore, enforceable against him in England.

Decision of Bray, J. (111 L.T. 564), affirmed.

Notes. Distinguished: *Re Dulles Settlement Trusts, Dulles* v. *Vidler*, [1951] 2 All E.R. 69. Referred: *Moreland* v. *Eley, Eley* v. *Moreland*, [1916] 1 K.B. 85; *Forsyth* v. *Forsyth*, [1947] 2 All E.R. 623; *Jacobs* v. *Jacobs and Ceen*, [1950] 1 All E.R. 96.

As to foreign judgments, see 7 Halsbury's Laws (3rd Edn.) 140 et seq.; and for cases see 11 Digest (Repl.) 501 et seq.

Cases referred to:

(1) *Schibsby* v. *Westenholz and others* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, *1220*.

(2) *Phillips* v. *Batho*, [1913] 3 K.B. 25; 82 L.J.K.B. 882; 109 L.T. 315; 29 T.L.R. 600; 11 Digest (Repl.) 519, *1329*.

(3) *Russell* v. *Smyth* (1842), 9 M. & W. 810; 11 L.J.Ex. 308; 152 E.R. 343; 11 Digest (Repl.) 512, *1277*.

(4) *Williams* v. *Jones* (1845), 13 M. & W. 628; 2 Dow. & L. 680; 1 New Pract. Cas. 227; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest (Repl.) 527, *1401*.

(5) *Carrick* v. *Hancock* (1895), 12 T.L.R. 59; 40 Sol. Jo. 157; 11 Digest (Repl.) 506, *1237*.

Also referred to in argument:

Jefferys v. *Boosey* (1854), 4 H.L.Cas. 815; 3 C.L.R. 625; 24 L.J.Ex. 81; 23 L.T.O.S. 273; 1 Jur.N.S. 615; 10 E.R. 681, H.L.; 2 Digest (Repl.) 174, *46*.

Ashbury v. *Ellis*, [1893] A.C. 339; 62 L.J.P.C. 107; 69 L.T. 159; 9 T.L.R. 517; 1 R. 388, P.C.; 11 Digest (Repl.) 531, *1423*.

Eschger, Ghesquirer & Co. v. *Morrison, Kekewich & Co.* (1890), 6 T.L.R. 145, C.A.; 29 Digest 488, *395*.

Keymer v. *Reddy*, [1912] 1 K.B. 215; 81 L.J.K.B. 266; 105 L.T. 841, C.A.; 16 Digest 122, *209*.

Malcolmson v. *Givins*, Times, Feb. 27, 1873.

Rayment v. *Rayment and Stuart, Chapman* v. *Chapman and Buist*, [1910] P. 271; 79 L.J.P. 115; 103 L.T. 430; 26 T.L.R. 634; 53 Sol. Jo. 721; 11 Digest (Repl.) 473, *1041*.

Mayer v. *Claretie* (1890), 7 T.L.R. 40, D.C.; 16 Digest 122, *207*.
Voinet v. *Barrett* (1885), 55 L.J.Q.B. 39; 34 W.R. 161; 2 T.L.R. 122, C.A.; 11 Digest (Repl.) 507, *1240*.
Rousillon v. *Rousillon* (1880), 14 Ch.D. 351; 49 L.J.Ch. 338; 42 L.T. 679; 44 J.P. 663; 28 W.R. 623; 11 Digest (Repl.) 443, *842*.
Emanuel v. *Symon*, [1908] 1 K.B. 302; 77 L.J.K.B. 180; 98 L.T. 304; 24 T.L.R. 85, C.A.; 11 Digest (Repl.) 505, *1224*.
Ringland v. *Lowndes* (1863), 15 C.B.N.S. 173; 33 L.J.C.P. 25; 9 L.T. 479; 10 Jur.N.S. 48; 12 W.R. 168; 143 E.R. 749; sub nom. *Kingsland* v. *Lowndes*, 3 New Rep. 84; on appeal (1864), 17 C.B.N.S. 514; 4 New Rep. 409; 33 L.J.C.P. 337; 28 J.P. 519; 10 Jur.N.S. 850; 12 W.R. 1010; 144 E.R. 207, Ex. Ch.; 2 Digest (Repl.) 538, *752*.
Davies v. *Price* (1864), 34 L.J.Q.B. 8; 11 L.T. 203; 12 W.R. 1009, Ex. Ch.; 2 Digest (Repl.) 574, *1067*.
Boissière & Co. v. *Brockner & Co.* (1889), 6 T.L.R. 85; 11 Digest (Repl.) 508, *1243*.
Sirdar Gurdyal Singh v. *Rajah of Faridkote*, [1894] A.C. 670; 10 T.L.R. 62; 11 R. 340, P.C.; 42 Digest 688, *1032*.

Appeal by the defendant from a judgment of BRAY, J.
The facts are set out in the judgment of BUCKLEY, L.J.

Atkinson, *K.C.*, and *T. B. Leigh* (*Boyd Merriman* with them) for the defendant.
Greer, *K.C.*, and *Latter* for the plaintiff.

BUCKLEY, L.J.—This is an appeal from a decision of BRAY, J. (1914), 111 L.T. 564, in an action brought in the Isle of Man by the plaintiff to enforce a judgment obtained by him against the defendant. The plaintiff was domiciled and resident in the Isle of Man; the defendant was resident in England and, primâ facie, was not subject to the jurisdiction of the Isle of Man court, and the question we have to consider is whether he so acted that he must be deemed to have submitted to the jurisdiction of the Isle of Man court. In order rightly to understand the question, it is necessary carefully to look into the rules of procedure which regulate legal proceedings in the Isle of Man. An action is not commenced by writ. It is provided by Ord. 2, r. 1, of the rules of 1884 of the High Court of Justice, Isle of Man, that

> "every action in the High Court, hereinafter called 'the court,' shall be commenced by filing in the Rolls Office a concise statement of the nature of the claim made, and of the relief or remedy required in the action."

What happened in the present case was this. On Dec. 17, 1913, the plaintiff made his statement of claim as follows:

> "The plaintiff's claim is for damages for loss of the society and service of his wife Amy Margaret Harris and for criminal conversation with her."

That statement of claim was filed in court on Dec. 27, 1912, and, according to the practice of the Isle of Man, that was the commencement of the action. The action having thus commenced, it appears that it is then listed and comes before the court on a certain day. It is provided by Order 8, r. 2:

> "In any case not of a criminal nature, if the summons be served personally upon a defendant, or it appear to the satisfaction of the court that the fact of such summons having been issued and having been attempted to have been served, has come to the knowledge of a defendant three days at least before the day on which such summons required him to appear, the cause may proceed and be determined in his absence, or may be adjourned or otherwise as to the court may seem fit."

When this action first came into the list, the defendant had not been served and did not appear in court. The plaintiff thereupon applied ex parte for leave to

issue a writ and to serve it on the defendant out of the jurisdiction. Leave was given on Feb. 17, 1913, and on Feb. 21 a writ was issued and was duly served on the defendant in England. On Mar. 17, 1913, the defendant by his advocate, Mr. Cruickshank, physically appeared in court, and this is what took place, according to the official record:

"Mr. McWhannell for plaintiff. Mr. Cruickshank appears conditionally to set aside writ. Defendant to file motion to set aside writ."

The evidence given by the Isle of Man lawyer shows that, in the Isle of Man, an appearance in an action is not entered as it is here. When a cause has been entered in the list, the defendant appears in court either personally or by his advocate, and the Deemster makes a note of his appearance in his book, and that is what happened here. On Mar. 31, notice of motion was given on behalf of the defendant:

"To set aside the order for service out of the jurisdiction of this court upon defendant granted by His Honour Deemster Callow, on Feb. 21, 1913, and the writ of summons issued thereunder on the following grounds: 1. That the rules of the High Court of Justice, 1884, do not contemplate or authorise service out of the jurisdiction in actions for tort. 2. That no cause of action arose or exists within the jurisdiction of this court. 3. That defendant is domiciled in England and has no domicil in the Isle of Man and never has had such last-mentioned domicil."

On April 23, counsel for the plaintiff and the defendant having been heard, this motion was dismissed out of court with costs. Subsequently, on May 19, the plaintiff gave notice of motion for interlocutory judgment and for an order for a special jury to assess the damages (if any) payable to the plaintiff under Ord. 19, r. 4.

That rule provides that:

"If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant or all defendants, if more than one, make default as mentioned in r. 2, the plaintiff may obtain an interlocutory judgment against the defendant or defendants, and the court shall thereupon direct a jury to assess the value of the goods, and the damages, or the damages only, as the case may be.

Referring back to r. 2 of Ord. 19, it is as follows:

"If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, obtain judgment for the amount claimed, with costs."

Therefore, in a case coming under r. 4, the defendant makes default if he does not, within the time allowed for that purpose, deliver a defence. There are two cases in which a defence is required, and they are dealt with in Ord. 14, rr. 6 and 7, the one being where a statement of case has been delivered to a defendant, and the other, under r. 7, which provides that:

"A defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of case, must deliver his defence (if any) at any time within ten days after his appearance, unless such time is extended by the court."

Therefore, if a defendant has appeared in an action, an interlocutory judgment may be obtained against him in default of defence. The interlocutory judgment, which was delivered on June 30, was in the following terms: [His Lordship then read the judgment, and continued:] That judgment, as drawn up, was on its face a judgment for default of appearance and not in default of defence. The case then went before a jury, when the claim was limited to damages for criminal conversation. The jury having returned a verdict in favour of the

plaintiff for £800 damages, judgment was duly entered for that amount together with costs for the plaintiff on July 15. The judgment contained the following recital:

> "The defendant, who is resident out of the jurisdiction, but upon whom a writ of summons in the action has been duly served, not having filed or delivered any defence nor appearing to the action."

That is the history of the proceedings in the Isle of Man court.

Therefore, when the defendant was served in this country with the process of the Isle of Man courts he need have done nothing at all in the matter, and, although judgment might have been obtained against him, it could not have been enforced unless he had some property within the jurisdiction of the court. The defendant, however, was not content to sit still and do nothing; he went over to the Isle of Man court and, by so doing, he did something which he thought it was in his interest to do. He went to the court and contended that the court had no jurisdiction over him. In that he failed. By electing to go to the court it was decided that he had become amenable to the jurisdiction of the court. In my opinion, there was a voluntary appearance by the defendant in the Isle of Man court in which he invoked a decision of that court which, if in his favour, he was going to take advantage of. He was bound by the decision of that court to the jurisdiction of which he had submitted, and that decision went against him. It then became his duty to appear in the action, but he failed to do so. He took his chance and must abide by the consequences. What was done by his advocate on Mar. 17 was either an unqualified or a qualified appearance. If it was the latter, it was an appearance for the purpose of obtaining a decision of the court whether the defendant was bound by the decision of the court on the question of jurisdiction. The court had decided that he was bound, and that he had submitted for all purposes to its jurisdiction. The question, therefore, is whether there is a duty on him to obey an order of a foreign court which, if he had not submitted to its jurisdiction, he might have disregarded. I think the doctrine which is applicable to this case is that, if a defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign court, that judgment is enforceable against him in this country: see *Schibsby* v. *Westenholz and others* (1). In my opinion, therefore, the defendant, having submitted to the jurisdiction of the Isle of Man court, owed a duty to that court to obey its judgment.

With regard to the form in which the interlocutory judgment is drawn up, it will be observed that it contains these words:

> "The defendant John Taylor having failed to appear or enter an appearance to the writ of summons in the action which has been duly served on him."

I think that must be taken to be an interlocutory judgment in default of defence. I think it is possible to read the interlocutory judgment in that way. The words "having failed to appear or enter an appearance" must mean "having failed to appear in bodily presence," and also refer to his not having entered formal appearance as he ought to have done after his motion had been dismissed on April 23. I do not think it is quite plain on the language of the judgment, but it does not matter very much, because, according to the practice, the Deemster was entitled to treat the appearance of the defendant as he thought proper, and he treated it as an appearance in the action for all purposes.

Therefore, what has happened is this: The defendant has submitted to the jurisdiction of the Isle of Man court, and this court will recognise that judgment, and will pronounce judgment in order to enforce that judgment. It is, therefore, unnecessary to consider the second point raised in this action, or the decision of SCRUTTON, J., in *Phillips* v. *Batho* (2), and I say nothing about it. This appeal fails, and must be dismissed.

PICKFORD, L.J.—I agree. I do not think this is an easy case to decide, and it is not made more easy by the fact that the Isle of Man courts have no

cut-and-dried system of procedure such as we have here. Primâ facie, it is quite clear that the Isle of Man court would have no jurisdiction over the defendant because he was not resident on the island, and could not in any way become subject to the jurisdiction of its courts unless he submitted to them. I am not prepared to accept the definition of a submission in this connection that the defendant voluntarily went to the Isle of Man court to have the main point in dispute decided. In this case, the procedure in the Isle of Man court, so far as it is necessary to state it, is this: A certain document, called a statement of claim, is filed, and the case is called on in court. The defendant may or may not be present. If he is present, no difficulty arises; he has to put in a defence. If he is not present and he is a resident in the Isle of Man, a certain procedure is followed, but, if he is not so resident, the plaintiff has then to obtain an order for service of a writ out of the jurisdiction. That was done in the present case, and defendant's counsel subsequently applied to the court to have the service of the writ set aside on the following grounds: that the rules did not authorise service out of the jurisdiction; that there was no cause of action within the jurisdiction of the court; and that the defendant was domiciled in England. That application was heard by the court and was dismissed. The next matter is that the plaintiff signed an interlocutory document and obtained a writ of inquiry for the assessment of the damages by a jury. The interlocutory judgment, as drawn up, states that the defendant had failed to appear or enter an appearance to the writ of summons in the action which had been duly served on him. The jury having returned a verdict in favour of the plaintiff for £800 damages, final judgment was entered for that amount against the defendant, and that judgment is expressed to be in default of defence, and, further, that the defendant had not appeared to the action.

It is said that those documents show what was done, and that, when the defendant applied to set aside the service of the writ, it was not an appearance in the action, nor was it treated as such. On the other hand, it is said that, whatever the form of the judgment, the court must be taken as having treated it as an appearance, because, although the interlocutory judgment was expressed to be in default of appearance, the court had only power to give judgment in default of defence, and therefore the judgment must be taken to be a judgment in default of defence. It is not quite clear what the practice of the Isle of Man is, and it is certainly odd that, if there is no power to sign judgment in default of appearance, there should be a form to that effect in their practice book. I think it is very likely that not very much consideration was given to the form of the judgment as the time for delivering a defence had gone by. I am inclined to think that the court treated the defendant's appearance to the motion as conditional, but that point does not seem to me to be of great importance, since the evidence of the defendant goes to show that, where such an appearance is made, it is within the discretion of the court to treat it as an appearance to the action. If a defendant applies to a court to set aside the service of a writ under which judgment could be obtained against him, and that court has the right to treat the application as amounting to an appearance in the action, then, in my opinion, he is bound by the judgment of that court and liable to pay on that judgment either in the Isle of Man or in any other country. I am of opinion that the defendant did submit to the jurisdiction of the Isle of Man court, and that the courts of this country will enforce that judgment against him. Under these circumstances I say nothing as to the second point.

BANKES, L.J.—I agree. I think the precise point which we have to decide has never arisen before, but the principles underlying all these cases seem to apply. The matter arises thus: [His Lordship stated the facts, and continued:] The question is whether what the defendant did brings him under an obligation to obey the ultimate judgment of the court against him. The rules under which the courts of this country enforce foreign judgments have been laid down in many

cases. In *Schibsby* v. *Westenholz and others* (1) BLACKBURN, J., said (L.R. 6 Q.B. at p. 159):

> "the true principle on which the judgments of foreign tribunals are enforced in England is that stated by PARKE, B., in *Russell* v. *Smyth* (3) (9 M. & W. at p. 159), and again repeated by him in *Williams* v. *Jones* (4) (13 M. & W. at p. 633), that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Therefore, the question which has to be considered is whether the foreign court is, as regards the defendant, a court of competent jurisdiction. The following instances are given where a foreign court is held to be a court of competent jurisdiction—namely, where the defendant was, at the commencement of the action, resident in the foreign country, or where he selected that tribunal, or where he voluntarily appeared in the action. I quite agree that in most of the cases which have been referred to the appearance of the defendant was an appearance in a technical sense and related to the particular procedure which the defendant had to follow in order to have a right to contest the matter, but a defendant may submit voluntarily to the jurisdiction of a foreign court in many other ways, since the principles underlying the case of a person resident in the foreign country or of a person who voluntarily submits to the jurisdiction of the courts of that foreign country apply equally to persons who appeal to a foreign court to be relieved from an obligation at a preliminary stage. With regard to defendants resident in a foreign country, it was contended in *Carrick* v. *Hancock* (5) that temporary residence in the foreign country did not create a state of circumstances which would oust the jurisdiction of the courts of that country over him. Mr. Arthur Cohen said in the course of his argument in that case (12 T.L.R. at p. 60) that

> "as a man would be protected from being robbed while passing through a foreign country, so also he was liable to the jurisdiction of its courts,"

and LORD RUSSELL OF KILLOWEN, C.J., said in his judgment (ibid.) that, in his opinion,

> "the duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time the person was actually on the territory was wholly immaterial."

If the duty of allegiance exists where only temporary protection of the law of the foreign country is claimed, it is a fortiori where a defendant appeals to a foreign court to relieve him from a liability. I think that fact places him under a duty to obey the judgment that may be passed on him. In the present case, the defendant asks whether the action is properly constituted as against him or not. In my opinion it is a misconception of the principle applicable to say that there is a voluntary submission on the part of a defendant to the jurisdiction of a foreign court only when he has consented to the ultimate judgment in the action. For these reasons, I think the decision of BRAY, J., is right and should be affirmed.

Appeal dismissed.

Solicitors: *Ridsdale & Son*, for *John Gardner*, Liverpool; *Grundy, Kershaw, Samson & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

HALL *v.* MANCHESTER CORPORATION

[HOUSE OF LORDS (Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), March 25, 26, 28, and May 4, 1915]

[Reported 84 L.J.Ch. 732; 113 L.T. 465; 79 J.P. 385; 31 T.L.R. 416; 13 L.G.R. 1105] B

Housing—House unfit for habitation—Unfitness due to proximity of other houses—Discretion of local authority—Manchester Corporation Waterworks and Improvement Act, 1867 (30 & 31 *Vict.*, c. *xxxvi*), s. 41.

Three houses in Manchester were structurally fit for human habitation when taken separately, but by reason of their original grouping and the proximity C of other houses might be considered to be unfit. Acting under s. 41 of the Manchester Corporation Waterworks and Development Act, 1867, Manchester Corporation made an order that the houses were "not fit for human habitation" and should not be inhabited. In an action for an injunction to restrain the corporation from acting on the order,

Held: the order was properly made, since a house might be unfit for human D habitation not only because of structural or other defects in the building, but for any other reason, including external causes, such as want of ventilation, and whether or not the houses were unfit was a matter for the judicial discretion of the corporation properly exercised, subject to such statutory right of appeal as was provided.

Notes. The general statutory provisions as to houses unfit for human habitation E are now contained in the Housing Act, 1957, Part II, s. 4 et seq.

Distinguished: *Cohen* v. *West Ham Corpn.*, [1933] All E.R.Rep. 24. Referred: *Estate and Trust Agencies (1927), Ltd.* v. *Singapore Improvement Trust*, [1937] 3 All E.R. 324.

As to fitness of houses for human habitation, see 19 HALSBURY'S LAWS (3rd Edn.) 602 et seq.; as to the Housing Act, 1957, see 37 HALSBURY'S STATUTES (2nd F Edn.) 314; and for cases see 26 DIGEST (Repl.) 680 et seq.

Cases referred to:

(1) *Stimpson* v. *Emmerson* (1847), 2 New Prac. Cas. 283; 9 L.T.O.S. 199; 2 Digest (Repl.) 656, *1760*.

(2) *Adams* v. *Great North of Scotland Rail. Co.*, [1891] A.C. 31; 2 Digest (Repl.) G 678, **1467*.

(3) *Glasgow City and District Rail. Co.* v. *MacGeorge, Cowan and Galloway* (1886), 13 R. (Ct. of Sess.) 609; 23 Sc.L.R. 414; 11 Digest (Repl.) 215, **613*.

(4) *Local Government Board* v. *Arlidge*, ante, p. 1; [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 12 L.G.R. 1109, H H.L.; 26 Digest (Repl.) 691, *74*.

(5) *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; 54 L.J.M.C. 81; 53 L.T. 157; 40 J.P. 420; 33 W.R. 661; 1 T.L.R. 313, H.L.; 26 Digest (Repl.) 571, *2357*.

Appeal by the plaintiffs against a decision of the Court of Appeal reported 111 L.T. 182, reversing a decision of the Vice-Chancellor of the County Palatine of I Lancaster at the trial of the action.

The substantial question was whether, under s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, the respondents, Manchester Corporation, were empowered to close three houses belonging to the appellant, situated in the working class district of the city, as unfit for human habitation by reason of the original grouping of the houses, their proximity and contact, it being admitted that each individual house taken separately was fit for human habitation. The houses in question were situated in Dorrington Street and Vine Street, Manchester,

A and were built about 1860 in accordance with the then regulations of the respondents, and no structural alterations had since been made. The houses had since been continuously occupied by tenants, and business had been conducted there for fifty years without noticeable damage in health to any occupier, there being no exceptional sickness or death rate among the tenants, and the houses were in a fair state of repair and drainage satisfactory. The appellant contended that the B object for which the closing order was made was to improve the locality without compensating the owner of the property required under the scheme to be pulled down or otherwise altered. He further contended that the Act of 1867 only gave the respondents power to make a closing order where the premises closed were themselves unfit for human habitation, and that not being the case with respect to his houses the closing order was ultra vires, and he claimed an injunction. The C respondents denied that the order had anything to do with an improvement scheme and contended that a building was unfit for human habitation within the meaning of s. 41 of the Act of 1867 if it was so unfit for any reason and not only, as the appellant alleged, if it was so unfit because of some structural or other defect existing in the building itself. The Vice-Chancellor decided the question in favour of the owner, but his decision was reversed by the Court of Appeal (LORD COZENS-D HARDY, M.R., BUCKLEY, L.J., and CHANNELL, J.). The owner appealed.

The Manchester Corporation Waterworks and Improvement Act, 1867, provided:

"41. In any case where it is certified to the corporation by an inspector of nuisances . . . that any building, or part of a building, is unfit for human habitation, the corporation may by their own order affixed conspicuously on such building or part of the building, declare the same is not fit for human E habitation, and shall not, after a date therein to be specified, be inhabited; any person who shall, after the date or time mentioned in such order, let or occupy, or knowingly suffer to be occupied, such building or part of building, shall be liable to a penalty not exceeding £5, and for a continuing offence not exceeding 40s. for every day during which the offence may continue. Provided always, that if at any time after such order the corporation shall be F satisfied that such house has become or has been rendered fit for human habitation they may revoke their said order. . . ."

The Manchester Improvement Act, 1871, provided:

"37. Any person dissatisfied with any order, determination, apportionment, or adjudication of the corporation or of any justice under this Act or G under the Manchester Corporation Waterworks and Improvement Act, 1867, shall be entitled to appeal against the same in manner provided by ss. 262, 263, and 264 of the Manchester Police Act, 1844."

The Manchester Police Act, 1844, s. 262, provided for an appeal to general quarter sessions.

Cyril Atkinson, K.C., Frank S. Foley, and *W. Taylor* for the appellant.

H *C. E. E. Jenkins, K.C.,* and *Arthur G. Roby* for the respondents.

The House took time for consideration.

May 4, 1915. The following opinions were read.

LORD DUNEDIN.—This case turns on the construction of s. 41 of the Man-I chester Corporation Waterworks and Improvement Act, 1867. Manchester is a city which is regulated by a series of private Acts, and, although it is also subject to such public Acts as are of application, I think the argument that this section is impliedly repealed by the subsequent public Acts dealing with matters of the same sort may be at once rejected. I agree with the learned Vice-Chancellor in thinking in particular that s. 91 of the Housing of the Working Classes Act, 1890, makes that argument impossible.

What does s. 41 provide? I think it provides, first, that to set the respondents in motion there is a condition precedent of a certificate being presented by the

inspector of nuisances or by two medical practitioners, which certificate must set forth, as to some building or part of it, that it is unfit for human habitation. On that being presented, the respondents may, by order affixed to the incriminated building or part thereof, declare that it is so unfit, and fix a time after which it is not to be inhabited. I think that the expression "may" declare shows that there is imposed on the respondents a duty of consideration as to whether the facts bear out the allegation contained in the certificate. If the duty imposed was a purely ministerial duty, I think the word would have been "shall." It is true that it is trite law that "may" in a statute may be equivalent to "shall." But each case must go on its own circumstances, and in my view all considerations of common sense point to the view I have expressed. It is, I think, inconceivable that a positive duty should be imposed on the respondents in respect of the ipsi diximus of any two medical practitioners, who need not even belong to Manchester. Now, if that duty is imposed on the respondents, I think the respondents must set themselves to the task in a judicial spirit; but if they do so, acting in good faith, and coming to a conclusion on the facts that they are warranted in making a declaration of unfitness, then I think no court can review that determination. The reason for that is that Parliament has chosen to commit the adjudication of this particular thing to a particular body.

In the case of anything being referred to the determination of one of the inferior yet constituted courts of the realm, there may be an appeal from the determination, though no such appeal is given. For there may be a common law or a statutory right of a superior court to review the decisions of a lower court. That doctrine, however, cannot apply where, as here, the one charged with the duty of determination is a person or corporation (which is just a legal person) and not a court. Then unless appeal is given there the matter must end; for it is that person, and that person alone, who Parliament has said must determine. But, while this is so, there is always side by side another doctrine which may have practical scope of application—viz., that when a person is given a right to do things which he could not do but for statutory allowance so to do, he must act within the allowance of the statute and not outside it, and if he attempts to act outside it he can be controlled by the High Court. Whether the control be exercised by way of certiorari or mandamus or injunction it is needless to inquire. All these things are matters of procedure, and procedure only. The rule I am stating is a rule of general law common to all enlightened systems, which may nevertheless differ very much in their methods of control. Applying this rule to the matter in hand, it follows that the corporation can only determine yea or nay to the question, is the building unfit for human habitation, and cannot under pretence that it is declaring it unfit for human habitation, really condemn the building on other grounds. In other words, they cannot act ultra vires, and if they do they may be restrained.

It is not, I think, very easy to express in definite language the difference between cases where an error in such decisions is an error which springs from ultra vires action and the cases where the error is an error on the merits. In concrete cases I do not think the difficulty is nearly so great. Experience shows that we have here that class of difficulty of which it may be said, solvitur ambulando. There is a class of cases which is not the same but very analogous, and in which the decisions, which are numerous, are, I think, helpful in this matter. I refer to the decisions, as regards the awards of arbitrators. The analogy rests in this. An arbitrator has no jurisdiction save what the parties by agreement confer on him. If he confines himself to the province in which he has jurisdiction, his award cannot be touched by a court of law, however wrong in the merits it may be; but if he wanders ultra fines compromissi, then a court of law will quash his award. The statute in this case does what the parties do in that. It tells the respondents that they may decide on certain things. They may decide that without review, but they can decide no other. Now there are two obvious ways in which the arbitrator, or here the respondents, may act ultra vires. They may, under colour of exercising a juris-

A diction, really want to attain another end. That is mala fides. Such a proceeding is negatived, I think rightly, in this case in the judgment of the learned Vice-Chancellor. But they may go bona fide on a wrong interpretation in law of what are really the fines compromissi. In such a case also the court will interfere. Your Lordships will easily understand that I am speaking quite apart from the provisions of the Arbitration Act, and rather as the law was laid down in *Stimpson* B v. *Emmerson* (1) as explained by Lord Halsbury, L.C., in *Adams* v. *Great North of Scotland Rail. Co.* (2).

I will venture to quote as illustrative in this matter a Scottish case, because the law of Scotland has no Arbitration Act, and therefore the position is as it was in England before the Arbitration Act, and because I conceive I am dealing with general legal principles of universal application. The case is that of *Glasgow City* C *and District Rail. Co.* v. *MacGeorge, Cowan and Galloway* (3). In that case a local City and District Railway Act allowed the promoter company to construct a tunnel under certain streets in Glasgow. It then provided that, if by reason of the construction any "structural damage" should be caused to the buildings of any frontagers (who had by their titles no property in the street, and whose land was, therefore, not taken), they should be entitled to compensation, to be deter- D mined in the usual way under the Lands Clauses (Consolidation) Act, 1845. The defendants, MacGeorge, Cowan and Galloway, were frontagers, and their building was injured. They claimed, went to arbitration, and the arbiter awarded a lump sum of £950 for structural damage. The railway company raised a reduction of the award on the ground that the arbiter had included in the so-called structural damage deterioration in the marketable value of the property. The Lord Ordinary E determined the action as irrelevant, holding that as the award bore on the face of it that the sum awarded was for structural damage, no more could be said. That the Inner House reversed and allowed a proof; i.e., they allowed the arbiter to be examined as to whether he had really acted ultra vires by including in structural damage what, on a proper interpretation of the phrase, was not structural damage at all. The arbiter was examined, and as it appeared that he had only allowed F for structural damage in the proper sense of the term, the court held it could not review the figure at which he had arrived, and the action of reduction was dismissed.

I think that case was strictly analogous to the present. I think the action raised before the learned Vice-Chancellor was a relevant action because it averred that on a just construction of the words, "unfit for human habitation," the corpora- G tion had condemned the buildings for a fault outside the fault specified in the statute. And, just as the arbiter was examined there, the corporation was, through its witnesses, examined here. So that, if the interpretation which the learned Vice-Chancellor put on the words, "unfit for human habitation," was correct, then I think his judgment was a judgment which he had a right to pronounce. That question therefore, and that I think alone, is the question which we have to deter- H mine, and that question is well expressed for the respondents in the first reason in the case before your Lordship's House, which is in these terms:

> "That a building is or may be unfit for human habitation within the meaning of s. 41 of the Act of 1867 if it is so unfit for any reason and not only as the appellant alleges if it is so unfit because of some structural or other defect existing in the building itself."

I

The learned Vice-Chancellor pronounced in the negative as to that proposition, but the Court of Appeal pronounced in the affirmative, and the question for your Lordships is, which was right. The question is not without difficulty, but, on consideration, I have come to agree with the Court of Appeal. The appellant's counsel argued that, inasmuch as the earlier Acts applying to Manchester and dealing with nuisance, ruinous buildings, and provision of drains, the words used, as regards buildings, pointed to a condition personal, so to speak, to the building itself, therefore the words unfit for human habitation must be construed in the

same manner. I do not say anything on this topic, as I think it is dealt with with great clearness and effect by BUCKLEY, L.J., in the court below, and I have nothing to add to what he has said. The words used in the Act are perfectly general, without any qualification whatever. Then the appellant argued that, if the wider meaning was given, it stultified s. 23 of 28 Vict., c. xc, which provides for the making of byelaws dealing with sufficiency of space round buildings and the ventilation thereof, and then provides that no such byelaw shall apply to a building erected before the passing of the Act. The plain answer is that the byelaws, which by the proviso are insured to be non-retrospective, may provide for a modern and up-to-date standard, whereas the condemnation under s. 41 of the Act of 1867 can only be when there is absolute unfitness for human habitation—a state of affairs which could not properly be said of many houses, although their ventilation might be far short of an up-to-date standard. That a house may be unfit for human habitation through non-ventilation seems obvious. It admittedly might be so if it had no windows. Nor do I think that anyone is entitled to trust for ventilation to his neighbour's ground, which may be lawfully covered with buildings right up to the edge of the property.

Another argument urged by the appellant I only mention to show it was not overlooked—viz., that the action of the respondents was mala fide in respect that it was really effecting without compensation what they ought to do with paying compensation, namely, the removal of No. 1 Dorrington Street, as an obstructive house. This argument always seemed to me worthless, as it omits to notice that in the action of the respondents under the present closing order there is no compulsion on the appellant to take down No. 1 Dorrington Street. If he chose to construct a ventilating court partly on No. 1 and partly on Nos. 60 and 62 Vine Street, he might equally avoid the closing order. This brings me to the argument which seems to have weighed with the learned Vice-Chancellor—viz., that, because the action contemplates the house becoming or being rendered fit for human occupation again, that points to something the owner can do. The answer I have already really indicated. No man is entitled to rely on his neighbour for his ventilation, and the opening up of a space on his own land is the remedy which lies in his hand. It is doubtless the case that as the matter stood in 1867 it left very large powers in the respondents, with very little check if the powers were abused. That state of affairs, however, was ended by the Manchester Improvement Act of 1871, which supplied what was probably an oversight in the Act of 1867, and gave an appeal such as was given by s. 262 of the Act of 1844—namely, to quarter sessions. This gives an appeal on the merits—i.e., as to whether the house is, in fact, unfit for human habitation.

That this appeal is in this case still open is, I think, clear; for I think it is clear from s. 41 of the Act of 1867 that the only operative order is an affixed order. In fact, affixture comes in place of service, and I am clearly of opinion that the appealing days begin to run from the date of affixture. It follows that, as in this case there has been no affixture, there will still be opportunity for the appellant to appeal on the merits. These merits are for the quarter sessions, and I do not think we should do more than point out, as, indeed, I have already said, that "unfit for human habitation" is a very strong expression, and vastly different from "not up to modern or model requirements." Further, that if such a term is applied to a house as a whole it must mean that each and every room is unfit—a result which, if the defect is want of ventilation, I can scarcely conceive being arrived at when there are rooms with windows facing a street.

The present appeal should, I think, be dismissed with costs.

LORD ATKINSON.—I concur. The facts have been already sufficiently stated. The appellant in his statement of claim has alleged that these three houses were not unfit for human habitation, and that the respondents were acting mala fide and endeavouring under colour of exercising their powers under s. 41 to evade a

liability imposed on them by Part I of s. 38 of the Housing of the Working Classes Act, 1890, and other Acts amending the same.

The proceedings of the respondents up to the issue of the writ appear to me on the face of them to be perfectly regular. This charge of mala fides made against them or their sub-committees, at the trial and persisted in before your Lordships, was dealt with by the Vice-Chancellor in the following passage of his judgment:

> "It is charged against the sub-committee of the corporation and Mr. Rook that they are actuated by 'bad faith' in taking advantage of the Act of 1867. If by 'bad faith' is meant a desire to do the plaintiff an injury, or that they had any motive except to do their public duty as they understood it, or that their finding of fact was a perverted or dishonest finding, I am satisfied on the evidence that such a charge is groundless. Mr. Rook inspected the yards and concluded that the air space was insufficient for proper ventilation. The members of the sub-committee who inspected the yards on April 19, accompanied by Dr. Nivin, came to the same conclusion, and it was, in my opinion, an honest, even if a mistaken, conclusion. But all knew they were working under the Act of 1867, as they had done on many previous occasions, and with the object, if they found the houses not fit for human habitation, of putting the section into operation, and thereby compelling the plaintiff to make alterations satisfying their requirements. If they so acted under a mistaken view of their powers under the statute, they acted, in my opinion, in good faith."

It is quite true that the respondents prepared plans showing the alterations in these houses which they considered would render them fit for human habitation. The alteration consisted in demolishing house No. 1 and converting its site into the yard or yards of Nos. 60 and 62. Section 41 of the Act of 1867 did not, however, confer on them any power to demolish a house, or to compel the owner of a house to make alterations in it of one kind rather than of another. All the statute enabled the respondents to do was by notice conspicuously affixed to a building or part of a building to declare such building or part of a building to be unfit for human habitation, and that it should not after a date to be therein specified be inhabited. The statute then inflicts a penalty on the person who after the date named lets or occupies, or knowingly suffers to be occupied, the building or part of a building so declared to be unfit for human habitation. If the respondents should any time thereafter be satisfied that "such house" has become or been rendered fit for human habitation, they may revoke their order. It is thus left entirely to the owner to remedy the defect in his premises. It cannot be successfully contended, in my opinion, that this section of the Act of 1867 is repealed, in whole or in part, by s. 38 and s. 39 of the Housing of the Working Classes Act, 1890. And, if that be so, I utterly fail to see what there is mala fide in the respondents, if their powers be cumulative, as I think they are, in putting into force their powers under the earlier rather than under the latter statute. No wrong or injustice is done to any owner in compelling him, in the interest of the public health, not to allow a house or building belonging to him which is unfit for human habitation to be used or occupied for that purpose. It was to effect this object the respondents took action. They and their sub-committee are found to have acted bona fide and in the honest belief that these houses were unfit for human habitation. The demolition of house No. 1, as is evident from the letters of the county surveyor of July 12, 1912, and that to the appellant on Nov. 6, following, was merely suggested as a mode in which the two remaining houses could be made fit for human habitation, but the appellant was left quite free to choose any other method of correcting the evil which might appear to him preferable. There is, in my opinion, nothing in this point. In addition, each of the three houses of the appellant would, as regards the remaining two, appear to be an "obstructive building" in relation to the others within the meaning of s. 38 of the later Act, since it is the close grouping or crowding together of the houses which renders the ventilation of each defective, and, moreover, s. 39 seems to

contemplate a large scheme of demolition and rearrangement not desired by the respondents in the present instance. A

It was next contended that the learned Vice-Chancellor had not found as a fact that the ventilation of any of the houses was defective or that the alleged unfitness of any of them for human habitation was due to this cause. No notice of a cross-appeal was served. The point was not raised in the Court of Appeal, and from the judgment of the Vice-Chancellor it would seem to have been assumed that the ventilation was defective. He says: B

> "It is admitted that each house taken separately is fit for human habitation, and that their unfitness lies in their contact and proximity."

And,

> "The enclosed yards are small in area and contain two pail closets and an ashpit. The passage leading into the yard is 2 ft. 9 in. in width, and the houses surrounding the yard are two-storied buildings. These yards are ill-ventilated, the only access to air being the narrow passage or over the roofs of the buildings." C

And ultimately, deciding on the construction of s. 41, he came to the conclusion that D

> "each building must be treated separately without regard to its proximity to or contact with any other building."

It would have been entirely unnecessary for him to have considered the construction of this s. 41 as to the kind of unfitness dealt with by it, if he had been of opinion that no unfitness for human habitation from any cause had been proved. E The natural way of raising this question of fact for decision was by lodging an appeal under s. 50 of the Manchester Corporation Act, 1882. The appellant has chosen to take another course. If his contention be right he has failed to get a finding in his favour on this issue of fact. The Vice-Chancellor was not asked expressly to find on the question whether each of these houses, or any part of them, was unfit for human habitation from want of ventilation, though a great deal of F evidence was given on the point. If the appellant has embarrassed himself by taking the course he has taken, rather than appealing, he has himself to blame. He may still, however, avail himself of the facilities to appeal offered to him by the respondents. It is quite impossible for the House to deal on this appeal with a contested issue of fact on which no inferior tribunal has pronounced any finding.

There remains then the real question, the only question dealt with by the G Court of Appeal, viz., the construction of the statute. What is the kind of unfitness for human habitation contemplated by this section? In my view it is impossible to confine the words of the section to an unfitness for human habitation due to structural defects in a house itself, or to defective internal physical conditions in a house itself. I think those words include an unfitness due to external causes, such as want of ventilation, noxious effluvia, &c. I am, therefore, of H opinion that the judgment of the Court of Appeal on this, the only point raised before it, was right. A lengthy argument was addressed to your Lordships on the injustice that might be done if, by the use of the word "may" in the section, an absolute discretion was held to be vested in the respondents to direct notices such as are mentioned to be affixed to premises simply on receipt of a certificate from an inspector of nuisances or two medical men, while no power of appeal was I given by the statute. It was urged that on the construction of this Act the respondents should be held bound, if their action should be challenged, to show, not merely that they were themselves honestly satisfied that the building or part of a building to which the notices were affixed was unfit for human habitation, but that it was in fact unfit. Their belief or conviction on the point would, it was urged, be insufficient; and to justify their action the tribunal before which they were impleaded should be satisfied of the unfitness for human habitation as well as themselves. The point is not now of practical importance since a right of

A appeal is given by the later statute, but I do not think the discretion of the respondents can be so limited. If they act without jurisdiction, or corruptly, or for some indirect motive, or against natural justice, their action could be restrained by injunction. They might possibly be compelled by mandamus to discharge their duty, or if the act they perform be in any given case in the nature of a "judicial act," in the wide meaning which that term has received, their order might B be removed by certiorari. These are safeguards independent of appeal, which though more or less cumbrous and costly are fairly adequate to prevent injustice or the abuse of power, and one is not driven to put on the section the strained construction contended for in order to prevent wrongs and abuses which can be otherwise prevented or checked. In my opinion, therefore, the section gives to the respondents, once they have obtained the preliminary certificate specified, a C discretion, subject to the control and supervision I have mentioned, to put their powers in force if they honestly believe that the circumstances of the case call for their exercise.

It was also contended that no appeal now lies under s. 50 of the Manchester Corporation Act, 1882, since more than twenty-eight days have elapsed since the date of the order. The town clerk had by his letter of Nov. 26, 1912, already D referred to, informed the appellant that it was considered that the time for appealing ran from the service of the order. By service he must have meant the affixing of the order to the premises, since that is the only mode of service provided for in s. 41. It is a mode of service often resorted to in different circumstances. The words of the section run thus:

> "The corporation may by their order affixed conspicuously on such building, E or part of a building, declare. . . ."

They cannot make any declaration by an order not so affixed. In that mode alone can their determination or adjudication be evidenced. I am myself inclined to think the town clerk was right, that an order is no order within the meaning of the section until it is affixed, and that the date when it is so affixed is its true date from which the time for appealing runs. It was, moreover, at the appellant's F request that the order was not "affixed." In addition the respondents have through their counsel undertaken not to raise this objection if an appeal be now taken. I think, on the whole, that the appeal should be dismissed with costs.

LORD PARKER OF WADDINGTON.—This appeal raises several points upon the true construction of s. 41 of the Manchester Corporation Waterworks and G Improvement Act, 1867. The section provides that in any case where it is certified to the respondents by the inspector of nuisances or by any two medical practitioners that a building or any part of a building is unfit for human habitation, the respondents may by their order, affixed conspicuously on such building or part of the building, declare that the same is not fit for human habitation and shall not after a date therein to be specified be inhabited. The section imposes a penalty H on any person who shall after the date mentioned in such order let or occupy or continue to let or occupy, or knowingly suffer to be occupied, such building or part of a building.

I think it reasonably clear that the object of this section is to enable the respondents to prohibit in the interest of public health the use for human habitation of buildings which are in fact unfit for that purpose. It is not intended to I make the certificate of the inspector of nuisances or any two medical practitioners conclusive on this point of fact. Where the fact is certified, the respondents can proceed under the section, but in so doing they must examine the circumstances and themselves come to a bona fide conclusion as to whether the building or part of the building in question is not in fact unfit for human habitation. They cannot rely solely on the certificate. The question then arises as to whether the power intrusted to the respondents is purely administrative or is a judicial power. On this point I have had considerable doubt, because there is no provision in the Act for hearing any party interested, or for receiving evidence, nor is there any pro-

vision for an appeal. But inasmuch as an order of the council under the section entails a penalty on persons who disregard it, I think on the whole that the respondents' power is in the nature of a judicial power, and that consequently any party interested has a right to be heard and, if he desires it, to adduce evidence, and, in case the power is abused, could protect himself by certiorari or injunction. It is to be observed too, that, since the passing of the Manchester Improvement Act, 1871, he has the right of appeal conferred by s. 37 of that Act. This appeal, however, has, by virtue of s. 50 of the Manchester Corporation Act, 1882, to be brought within twenty-eight days after the date of the order or adjudication complained of, and there was some discussion as to when the twenty-eight days commenced to run for the purposes of s. 41 of the Act of 1867. It is clear that under the section an order of the respondents has no operation unless and until it be affixed to the premises. There is no provision for its service otherwise than by so affixing it. I think, therefore, that the twenty-eight days must be held to run, not from the making, but from the affixing of the order.

There is one other question which arises on the construction of s. 41 of the Act of 1867. Can a house be, within the meaning of the section, unfit for human habitation for a reason extrinsic to itself; e.g., because neighbouring buildings preclude the access of air and impair its proper ventilation? It was argued that a building could not be unfit for human habitation within the meaning of the section unless it was in itself and without reference to surrounding circumstances so unfit. I agree with the Court of Appeal that this construction cannot be maintained. The sole question in every case is whether the house is as a fact unfit for human habitation, and not in any case the cause of the unfitness. The arguments to the contrary founded on the public statutes in force at the time do not appear to me to be sound. There is, in my opinion, no presumption that a corporation promoting a private Act for the better government of their district are not seeking to obtain, or that the legislature does not intend by the private Act to confer on them, powers additional to or more beneficial than those powers which are enjoyed by other corporations under the general law.

A suggestion was also made in argument that the powers conferred by s. 41 of the Act of 1867 have in some way been abrogated or limited by s. 91 of the Housing of the Working Classes Act, 1890. As a matter of fact, s. 91 of the last-mentioned Act expressly preserves these powers, though it provides that

> "a local authority shall not by reason of any local Act relating to a place within its jurisdiction be exempted from the performance of any duty or obligation to which such authority are subject under any part of this Act."

It is said that the respondents were by virtue of the last-mentioned Act under an obligation to apply to one or more of the buildings in question the provisions of s. 38 thereof. It will be found, however, on reference to that section that, although corporations are bound to take the question into their consideration, they are not bound to proceed to put the powers of the section into force, and, in my opinion, the fact that the object of the section can be attained at less expense under a private Act would be a legitimate reason for proceeding under the private Act rather than under s. 38. In the present case the city council, on Aug. 7, 1912, confirmed an order made by their sanitary committee on July 31, 1912, declaring three houses of the appellant, Nos. 60 and 62 Vine Street, and No. 1 Dorrington Street, to be unfit for human habitation, and fixing twenty-eight days from the service of the order as the period after which they were not to be inhabited. This order was never affixed to any of the houses of the appellant with which it deals, but on Oct. 25 the town clerk wrote to the appellant saying that unless the houses were altered to the satisfaction of the city surveyor he would have no alternative but to "post the notices," meaning, I suppose, to affix notice of the order to the premises. Thereupon, after some correspondence, the appellant issued his writ in this action claiming an injunction restraining the respondents from affixing on his premises or any part thereof any notice declaring the same or any part thereof

to be unfit for human habitation. There is no doubt that the inspector of nuisances had certified the houses as unfit for human habitation, or that the appellant had an opportunity of being heard on the matter, but in his pleading the appellant suggested mala fides, a suggestion which was disproved at the trial. His chief contention was, however, that the section referred only to buildings in themselves useful for human habitation. The Vice-Chancellor took this view, and, inasmuch as the alleged unfitness in each case was due, not to the house itself, but to the circumstances, he held that the section did not apply. The Court of Appeal reversed the decision of the Vice-Chancellor on the ground that the section applied from whatever cause the building or part of a building was unfit for human habitation. In this, I think, they were right, and it follows that this appeal should be dismissed with costs.

I desire to add that if the respondents are minded to proceed further with the matter under s. 41 dealing with the houses in question, they would do well to consider the following points. In deciding whether a house is unfit for human habitation, reference must necessarily be made to some standard of fitness or unfitness. The fact that the respondents have a certain standard of fitness which they desire to impose on the area subject to their jurisdiction, and that the building in question falls short of that standard, will not in my opinion necessarily render the house unfit within the meaning of the section. Thus the absence of such air spaces at the front and back as are prescribed by the byelaws in respect of new houses would not, in my opinion, be alone sufficient to justify the corporation in making an order under the section. The standard to be applied would seem to be that of the ordinary reasonable man. This test may seem vague, but it will be found quite sufficient except in cases on the border-line, and in such cases the respondents will proceed at their own risk and must expect litigation. Once again it seems reasonably clear that the respondents cannot make an order as to the whole building where part only is unfit for human habitation. The mere fact that there are rooms in a house so devoid of light or air as to be unfit for human habitation will not justify them in closing the whole house. I venture to make the above remarks because, although your Lordships' attention was not called to the evidence, there appears to me to be some doubt on the plans produced whether the confined air space at the back of the houses was sufficient to render them unfit for habitation according to the standard of ordinary reasonable men, and also because the alterations suggested by the respondents will not improve the ventilation of considerable parts of the buildings, which if now unfit for habitation, will remain unfit even though the alterations be carried out, a fact which seems to point to the order having been too wide. I do not intend to decide either of these points, but they are worthy of the consideration of the respondents if they determine to proceed.

LORD SUMNER.—This appeal depends in the first instance on the meaning of the Manchester Corporation Waterworks and Improvement Act, 1867, s. 41. There has clearly been no implied repeal by subsequent legislation. It stands, and must be construed as it would have been construed when enacted, and to my mind it runs in plain and untechnical language. The section enables the respondents to declare a building to be "not fit for human habitation," and thereupon to make its habitation an offence for which a heavy penalty may be imposed. It does not say from what causes the unfitness must arise. It does not specify who, if anybody, must be to blame. It is concerned with the building. It says that the building may be declared unfit when it is certified to be unfit. Public health is the matter in hand, and public health seems to demand that a building which is in fact unfit to be inhabited should not be inhabited, whatever be the cause and whosesoever the blame. I find no warrant, not even in the reference to an "inspector of nuisances," for limiting this section to unfitness owing to or in the nature of a nuisance. The prior legislation about public health or the removal of nuisances is not incorporated. This Act is an omnibus Act. Neither its pre-

amble nor its other sections limit s. 41. There is nothing to confine the unfitness for habitation to unfitness due to something in the state or the construction or condition of the building itself, and I do not see why we should supply this. Why are we to suppose that the legislature meant this concrete question to be considered in the abstract, as if the building stood in the midst of an imaginary desert and not in a particular street in a populous city?

True, the section does not invest the respondents with certain powers ancillary to the exercise of this function, as might have been expected. It does not enable their officers to enter the premises without the consent of the owner or occupier, in order to inspect their condition. It does not enable them to alter the premises if the owner declines to do so, or in case of need to pull them down, even though the existence of the premises, inhabited or uninhabited, causes unfitness for human habitation in adjacent buildings. It may be the case, as is suggested, that no public general Act confers on municipal corporations at large powers so wide as this section appears to confer on Manchester Corporation. Still I do not see that these points assist the construction of the section. Whether it refers to unfitness, as such, or only to unfitness by reason of the state in which the building itself is, whether the powers given are to be measured in some way by the provisions of the prior enactments or are as wide in substance as they are in expression, the absence of power to enter or of power to demolish is equally embarrassing, and is equally significant or insignificant. A similar answer must be made to the point that by s. 23 of 28 Vict., c. xc., the respondents' power of making byelaws designed (inter alia) to secure a sufficiency of air space, does not extend to old houses, and that this provision for the house-owner's protection might be evaded if the respondents could close by order a house which they could not regulate by byelaw. The objection arises equally whether the unfitness named in the section is construed as unfitness proper to the house and due to its state or to unfitness arising from the effect of other houses on its circulation of air. An old house, though beyond the scope of the byelaw power as such, would be subject to s. 41 if its structure made it unventilated in itself, so that the construction of the section remains unaffected by this argument. So, too, if, as is urged, no other city has powers as ample as Manchester claims under this section, that only shows that the legislature has preferred Manchester before other cities, and it is not for me to say why it should not. Counsel for the respondents formally admitted (in my opinion not going beyond what the section implies) that the respondents' function under it is a judicial one, and is not merely administrative; that they must themselves investigate the case, and not be contented with mere satisfaction of the condition precedent as to a certificate from an inspector of nuisances or two doctors; that in proceeding under the section they must observe, and not contravene, the rules of justice and fair play; that, for example, they must give parties concerned an effective opportunity of being heard, not necessarily before the city council, but by some authoritative delegacy, and not only of being heard but of adducing evidence if they wish, and that if, in these respects or in any other way they act or threaten to act ultra vires or in contravention of their duty under the section, they may be controlled by mandamus, certiorari, or injunction, as the case may be. In my opinion, when the exercise of the power is thus fully hedged about, there is no reason to question that the legislature meant it to be enjoyed in the full breadth of the term in which it is conferred. So much for the main point on the section.

The appellant's argument, very ably put, has not been limited to the bare construction of the section. It is suggested that the appellant and his houses have been condemned unheard, that he has been manœuvred out of his right of appeal, that he is mulcted for a sanitarian's counsel of perfection, that what was good enough for our fathers should be good enough for us, that the respondents are trying to improve the city at the appellant's private expense, instead of, as they have power to do, at the expense of the ratepayers. It is said, furthermore, that, if these suggestions are not borne out by the facts of this case, still, by way of hypothesis, the respondents' construction of the section involves the right to

condemn the houses even though every one of these things were true, and therefore that such a construction cannot be one which the legislature ever intended. Enough has been urged in this connection to make it right to say that the suggested abuse of the respondents' powers does not appear to have been proved. When Mr. Hall appeared before the housing and unhealthy dwellings sub-committee, it is true that his case was somewhat summarily disposed of, but he was well able to take care of himself. He knew the sub-committee's point, and they knew his. He does not appear to have desired to call evidence. Speech-making would not have mended matters. Though little was said and no time was wasted, I think it cannot be held that he was unfairly cut short or went unheard. Again, the ultimate decision was not within the competence of the sub-committee before which he appeared, and, when the matter was finally decided, first by the sanitary committee of the council and then by the city council itself, he was not present, nor was he summoned. Here, too, I think, there was no substantial injustice, for it is plain that the recommendation of the sub-committee was approved as matter of course, since in the meantime the appellant had not complied with its requirements. I think this point falls within the decision of your Lordships' House in *Local Government Board* v. *Arlidge* (4).

It is argued that the respondents have evaded some duty to proceed in this matter under the Housing of the Working Classes Act, 1890. I think there is a confusion here. Section 32 (1) is the one which alone imposes a duty; whether that duty is absolute or admits of any and what discretion need not now be determined. That section applies when a dwelling-house "is in a state so dangerous or injurious to health as to be unfit for human habitation," but it has been truly pointed out for the appellant here, and, indeed, is in the forefront of his complaint, that his houses are not in a state so dangerous or injurious to health as to be unfit for habitation at all. They are only declared to be unfit owing to the proximity of other houses, apart from which they would be unobjectionable. Their unfitness, such as it is, does not arise out of their state at all. If these houses are regarded as obstructive dwellings which obstruct other dwellings, though not more than the other dwellings obstruct them, the section of the Housing of the Working Classes Act, 1890, which would be applicable, is s. 38, and then the respondents have a discretion to proceed or not to proceed. The case is not one where, the circumstances imposing a duty to use powers under one Act, the respondents proceed to use powers under another Act for the mere purpose of getting rid of those circumstances and of that duty. No evasion is established here. It is not shown that the Housing of the Working Classes Act, 1890, imposed on the respondents a duty to deal with the appellant's houses under its provisions. Possibly the powers given by the Housing of the Working Classes Act, 1890, s. 38, might have been exercised, but the question is whether the powers of s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, were not equally exercisable. Resort to the powers given by s. 41 of that Act is not ipso facto evasion of a duty to use the powers given by s. 38 of the Act of 1890. It is only the reason why no duty under the latter section ever arises. The conduct of the respondents may have been unsympathetic, and their administration Draconian; but, if that is all, we are not called on to say what we think about it.

In the matter of the right of appeal I think the appellant has been mistaken from the first. By the Manchester Improvement Act, 1871, s. 37, and the Manchester Police Act, 1844, s. 262, the appellant, if dissatisfied with an order made under s. 41 of the 1867 Act, was given a right of appeal to the general quarter sessions for the borough. The appellant has been advised that the time for this statutory appeal, which has to be taken by giving notice of appeal, runs from the date when the city council adopted their sanitary committee's recommendation that the houses in question should be closed. He complains that he was not informed that this adoptive resolution had been passed till so long after its date that the statutory interval for giving notice of appeal had elapsed. On this he has argued that, since such a thing is permissible under the section—nay, has actually happened—the

section should be read in a narrowly restricted sense, so that if the respondents should be minded to be tyrannical they may at least be only a tyrant on a small scale. A

The whole of this is, in my opinion, fallacious. By the section the only thing that operates against the appellant is an order "affixed conspicuously on his building." Till such publication has taken place neither he nor his tenants can be fined, and, as far as I can see, the respondents are free to rescind or to ignore their own determination or order. The words of the proviso at the end of the section, which refer to revocation of an order which has been affixed on the building and then has been complied with, seem to me to confirm this view. The right of appeal given by the Manchester Improvement Act, 1871, s. 37, is an appeal against an order, determination, or adjudication of the respondents with which the appellant is dissatisfied, and nothing can be truly said to be adjudicated or ordered which is done behind the backs of the parties affected, and may be altered, cancelled, or forgotten just as the body making the order may choose. Further, the appellant has no appealable dissatisfaction with something which he can disregard without peril or prejudice to himself. It is said, and truly so, that such a construction requires the house to be placarded and pro tanto aspersed before the owner can appeal at all, but I do not see what difference it makes whether the order is published on the house or in the newspapers, or otherwise, to all whom it may concern. It is not appealable till it is operative, and it is not operative till it is published in manner prescribed by the Act. B C D

It is said, too, that the gist of the offence is occupation after the expiration of a time fixed in the order, and that the respondents might deliberately limit by their order a time so short as to disable the owner of the building from bringing any appeal to a hearing. So I suppose they might, but, if they did, I think they would find somehow, and quickly too, that they had not kept on the windy side of the law. When the legislature thinks fit to entrust a great corporation, with a judicial function, as I must conceive this to be, I do not think its meaning is to be tested by making the unsubstantial hypothesis that the corporation will betray their trust. Furthermore, the effect of s. 49 of the Act of 1867, which applies s. 247 to s. 261 of the Manchester Police Act, 1844, to the Act of 1867, is to make the penalties imposed by s. 41 recoverable, and as I think exclusively recoverable, before justices, and s. 50 of the same Act provides for the case of an offence, completed by non-compliance within the time fixed, even though the time for applying has not run out, and a fortiori for a case where the notice of appeal has been given but it has not been possible to bring the appeal to a hearing, in a manner which sufficiently meets the difficulty suggested by the argument. I think these considerations suffice to dispose of what seems to be really an academic objection. This being so, the appellant will have an opportunity, when a closing order has been affixed on his buildings, of appealing against it to the city sessions. Various questions which were raised before your Lordships and the courts below will then be open to him. Is a house unfit for human habitation which has been fitly inhabited for over half a century? Is this alleged stuffiness a real unfitness or a sanitary fad? Is a house unfit merely because other houses are built very close to it, though there is no objection to its own condition or construction? If the old privies are removed, as I understand the various owners have done or will do, is a house unfit merely because its back yard is inconveniently small? Is it unfit even though that back yard, with or apart from adjacent buildings, provides scanty ventilation or light to a scullery, or a cellar, or a staircase window, the living rooms being well lit and well ventilated? If such back part is unfit, can an order be made condemning the whole house, and so declaring the front parts unfit as well, though they open on to reasonably wide streets? As these questions may be, and I dare say will be, discussed elsewhere, I will only say what I think, as the Court of Appeal thought, that there is a good deal to be said about them. E F G H I

One point remains. Can the appellant bring an action for trespass to his buildings on the ground that an order has been affixed to them which was made in error,

A or can he bring an action for an injunction to restrain such an anticipated trespass, and in either case raise directly the question of fact whether the houses are fit for habitation or not as a question for a judge or jury? Frankly, my Lords, I hope that he cannot. The appeal to the sessions is an apt and usual way of getting such a question judicially determined, though it is true that the remedies are less wide than those which the High Court can give. If, in addition, the same matter B can be raised in the High Court, a recalcitrant owner in a doubtful or unpopular case might thwart the exercise of the respondents' powers by the threat of protracted and costly litigation. The Vice-Chancellor heard evidence at the trial as to the actual condition of the buildings in question with reference to their fitness or unfitness for human habitation. This was relevant to the issue as to the respondents' good faith, an issue disposed of in the respondents' favour. In so far C as such evidence was tendered on the question of the fitness of the buildings in fact, I do not think it was completed. Certainly the Vice-Chancellor decided no such issue of fact, but held that under the section it was not competent for him to do so. When the respondents appealed, the present appellant gave no notice that he would ask to have the decision below varied, or to have the case sent back to be completed and disposed of on this issue, a course which, by R.S.C., Ord. 58, r. 6, D he ought to have taken if he was to raise any such question on appeal, nor does he appear to have argued this point. It seems to me that the competency of an inquiry into this issue of fact in such an action as the present may not strictly come before your Lordships for decision on this appeal, but I will venture to say a few words on the point. Section 41 of the Act of 1867 is provided with no machinery of appeal. I shall assume that from 1867 to 1871, any person affected by the respon- E dents' order could test its validity on the merits in an action at law, and so put the defendants to justify their proceedings, though I think it may be doubted whether a section which enables a corporation by their own act to create an offence punishable by a court of summary jurisdiction can be construed as impliedly subjecting the exercise of that power to the ordinary civil jurisdiction in an action; and LORD SELBORNE's language in *Spackman* v. *Plumstead Board of Works* (5) gives F ground for saying that under that section the respondents' order was final. It is said that this section is the only empowering section in all the Manchester Acts which does not provide for an appeal. It is suggested that this was an inadvertent omission, cured at the respondents' own instance when next they had occasion to come to Parliament. I daresay this is so, but the Act of 1871 does not provide that it is to be construed as one with or as part of the Act of 1867, and I do not think a G mere surmise that the appeal was inadvertently omitted from the first Act can supply the want of such words in the second. Their omission is simply another case of inadvertence. The appeal given, however, is against any order of the respondents or of any justice, under this Act, the Act of 1871, or under the Act of 1867. The orders of justices would not be open to review in an action. So far as they are concerned, the appeal given in 1871 is clearly an exclusive remedy. I H think it would be anomalous, as most certainly it would be inconvenient, to construe the appeal given in 1871, so far as the respondents' orders are concerned, as a concurrent remedy, and I think the section may be, and ought to be, read as conferring the particular remedy by way of appeal on the assumption in both cases that, so far as the question of fact is concerned, either there has been no other remedy before, or that at any rate there shall be no other remedy thereafter. In I either case it makes the general quarter sessions, in effect, the exclusive tribunal before which the correctness of the respondents' decision can be questioned, assuming that an occasion for the exercise of its jurisdiction has occurred. Accordingly, I am of opinion that the appeal fails on all points, and should be dismissed.

LORD PARMOOR.—The appellant is the owner in fee of Nos. 1, Dorrington Street, and 60 and 62, Vine Street, Hulme, in the city of Manchester. On Apr. 19, 1912, an inspector of nuisances in and for the city of Manchester certified under s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, that

the above buildings were unfit for human habitation. After inquiry and consideration the town clerk, on Oct. 4, 1912, was instructed to post on the above buildings an order declaring them unfit for human habitation. Before posting the order the town clerk wrote to the appellant to give him a further opportunity to carry out certain alterations to the satisfaction of the city surveyor. In answer to this communication, the appellant gave notice that he intended to question the legality of the action of the respondents, and asked that the posting of the order should in the meantime be suspended. The appellant then commenced an action in the Chancery Division of the County Palatine of Lancaster for an injunction to restrain the respondents from entering on his property and posting and affixing thereon notices declaring such property unfit for human habitation, and obtained a declaration in his favour. This decision was reversed in the Court of Appeal.

The question to be decided turns wholly on the construction of s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867. It is not necessary to restate the words of the section, but the construction does not appear to me to present any unusual difficulty. It is clear that no question of fact as to whether a building is or is not unfit for human habitation can be competently entertained in these proceedings. I agree with the emphatic words of BUCKLEY, L.J., that the court in these proceedings has nothing to do with questions of fact. Section 41, as it stood in the Act of 1867, did not provide any appeal against the determination of the respondents, and made the respondents the final tribunal to determine questions of fact, provided that they acted bona fide, and within the powers which the section conferred on them. Later, in 1871, an appeal to the general quarter sessions was given to any person dissatisfied with any order, determination, apportionment, or adjudication of the respondents. Hence there is an appeal open to the general quarter sessions on questions of fact, but the appellant has preferred to raise a question of law.

In the argument before your Lordships the point was raised whether an appeal to the general quarter sessions was still open to the appellant, having regard to the lapse of time. This does not come before the House for direct decision, but I agree with the view expressed in the letter of the town clerk of Nov. 28, 1912. The authority given to the respondents under the section is to declare a building, or part of a building, not fit for human habitation by affixing their order conspicuously on such building or part of such building. Until such order has been so affixed there has been no formal determination or adjudication by the respondents, and, provided that the notice of appeal is given within twenty-eight days from the date of the affixing of the order, it appears to me to be in time. Counsel for the respondents stated that they were willing to issue a new order, as they had no desire to put any obstacle in the way of an appeal by the appellant to the general quarter sessions. The case for the appellant is that the respondents are not acting within their statutory authority in proposing to affix the order on Nos. 1, Dorrington Street, and 60 and 62, Vine Street, in the city of Manchester. At one time an allegation was made that the respondents had not acted bona fide, but from some sinister or indirect motive. I can find no evidence to support this allegation. It was not seriously pressed in the argument before your Lordships. In my opinion the procedure adopted by the corporation gives a fair notice to the owner of the buildings affected and enables him to obtain a fair hearing. The letters of the town clerk show that the respondents were desirous to give full opportunity to the appellant to enable him to comply with their requisitions before actually affixing the order on the buildings. The appellant contends that the respondents have no power under the section to declare a building or part of a building unfit for human habitation unless such building, or part of such building, is so unfit by reason of some structural or other defect existing in the building itself. I doubt whether the learned Vice-Chancellor adopted this view of the section. He says:

> "The unfitness referred to in the section is, I think, an unfitness which arises from the act or default of an owner, and which he can remedy, and does not apply to an unfitness which he cannot."

It is unnecessary, however, to further consider the construction contended for by the appellant, or that adopted by the learned Vice-Chancellor, since the respondents claim that, if a building or part of a building is from any cause, intrinsic or extrinsic, unfit for human habitation, they have power to make an order, not for closing such building or part thereof, but to prevent its use for the purpose of human habitation. In the present case insufficient air space and ventilation are the alleged cause of the unfitness on which the order was made. Whether or not the respondents have given a right decision within the ambit of their power does not arise in this appeal, and I desire to give no indication of opinion on either side. Section 41 of the Act of 1867 does not in form contain any words of limitation. The section appears to me to be unambiguous, and I adopt without any hesitation on this point the judgments in the Court of Appeal. In his address counsel for the appellant referred to a number of preceding or subsequent Acts in support of his argument that the scope of the section was limited to unfitness caused by some structural or other defect existing in the building itself. The later Acts have no relevance to the question of construction, but no doubt preceding Acts may be material so far as they show the state of the law at the time of the passing of the Act of 1867. These Acts are four in number, three of them general public Acts containing provisions for public health and sanitation, and one a local Act of Manchester of 1844. When the sections in these Acts, to which the attention of the House was directed, are considered, they give no assistance in the construction of s. 41 of the Act of 1867. Assuming that the powers conferred in the sections of the preceding Acts only apply to buildings unfit because of some structural or other defect existing in the building itself, no inference arises that a similar restriction should be implied in s. 41 of the Act of 1867 in which the language is different.

In my opinion the respondents are acting within their powers and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Edward Le Voi & Co.*, for *H. L. F. Berry*, Manchester; *Austin & Austin*, for *Thomas Hudson*, Town Clerk, Manchester.

[*Reported by* W. E. REID, ESQ., *Barrister-at-Law.*]

SCHAFFENIUS *v.* GOLDBERG

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Bankes, and Warrington, L.JJ.), November 26, 1915]

[Reported [1916] 1 K.B. 284; 85 L.J.K.B. 374; 113 L.T. 949; 32 T.L.R. 133; 60 Sol. Jo. 105]

Alien—Enemy—Right to sue—Effect of internment.

The restraint imposed on the movements of an alien enemy, who is resident in this country under a licence to remain here granted him by the Crown on his registration as an alien enemy under the appropriate legislation, by his internment within the realm as a civilian prisoner of war does not make him an alien ex lege and deprive him of his civil rights in respect of a lawful contract entered into by him before the internment. He is in no worse position than a person who is in custody for an offence.

Sparenburgh v. *Bannatyne* (1) (1 Bos. & P. 163) applied.

Dictum in *Wells* v. *Williams* (2) (1 Lord Raym. 282, at p. 283), disapproved.

Notes. Applied: *Nordman* v. *Rayner* (1916), 33 T.L.R. 87; *Netz* v. *Ede*, [1946] 1 All E.R. 628. Considered: *R.* v. *Bottrill, Ex parte Kuechenmeister*,

[1946] 2 All E.R. 434. Referred to: *Johnstone* v. *Pedlar*, [1921] All E.R.Rep. 176; *Re an Arbitration between N. V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij and Soufracht*, [1942] 1 K.B. 222.

As to the right to sue of alien enemies, see HALSBURY'S LAWS (3rd Edn.) tit. Ward Emergency; and for cases see 2 Digest (Repl.) 241–247.

Cases referred to:

(1) *Sparenburgh* v. *Bannatyne* (1797), 1 Bos. & P. 163; 2 Esp. 580; 126 E.R. 837; 2 Digest (Repl.) 242, *447*.

(2) *Wells* v. *Williams* (1647), 1 Lut. 34; 1 Salk. 46; 1 Ld. Raym. 282; 125 E.R. 18; 2 Digest (Repl.) 242, *440*.

(3) *Porter* v. *Freudenberg*, *Kreglinger* v. *Samuel and Rosenfeld*, *Re Merten's Patents*, post; [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 242, *444*.

(4) *R.* v. *Superintendent of Vine Street Police Station*, *Ex parte Liebmann*, post, p. 393; [1916] 1 K.B. 268; 85 L.J.K.B. 210; 113 L.T. 971; 80 J.P. 49; 32 T.L.R. 3; 25 Cox, C.C. 179; 2 Digest (Repl.) 244, *464*.

(5) *Princess Thurn and Taxis* v. *Moffitt*, ante, p. 301; [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26; 2 Digest (Repl.) 242, *443*.

Also referred to in argument:

R. v. *Schiever* (1759), 2 Burr. 765; 97 E.R. 551; 2 Digest (Repl.) 216, *290*.

Furly v. *Newnham* (1780), 2 Doug. K.B. 419; 99 E.R. 269; 2 Digest (Repl.) 244, *463*.

Three Spanish Sailors' Case (1779), 2 Wm. Bl. 1324; 96 E.R. 775; 2 Digest (Repl.) 244, *462*.

Wolf & Sons v. *Carr*, *Parker & Co.* (1915), 31 T.L.R. 407; [1915] W.N. 195, C.A.; 2 Digest (Repl.) 241, *439*.

Maria v. *Hall* (1807), 1 Taunt. 33; 127 E.R. 741; 2 Digest (Repl.) 242, *448*.

Re Mary, Duchess of Sutherland, *Bechoff, David & Co.* v. *Bubna* (1915), 31 T.L.R. 248; subsequent proceedings, 31 T.L.R. 394, C.A.; 2 Digest (Repl.) 215, *284*.

Appeal by the defendant from an order of YOUNGER, J., made in an action brought by the plaintiff to enforce an agreement between the parties.

Elkin for the defendant.

J. B. Matthews, K.C., and *Samuel Duncan* for the plaintiff.

LORD COZENS-HARDY, M.R.—This is an appeal from the judgment of YOUNGER, J., which raises a point which is undoubtedly one of importance.

The plaintiff was a German by birth who had been resident in this country for twenty-two years, and had carried on business here during that time. Immediately after the outbreak of the war [between Great Britain and Germany on Aug. 4, 1914] he registered himself under the provisions in force for the registration of aliens. That operated as a licence for him to remain in the country, and carried with it the right to trade and enter into agreements with British subjects. The agreement in question, under which the plaintiff agreed to finance the defendant in a business concerned with the manufacture of picture mouldings and to buy from him the whole of his output, was entered into in March, 1915, and there is nothing in the agreement itself to lend colour to the suggestion that it was otherwise than perfectly free from objection. A considerable sum of money is admittedly due from the defendant to the plaintiff under that agreement. The plaintiff was interned in July, 1915; a writ was issued on Sept. 7, and the judgment was delivered on Sept. 29. The only point tried was this. The defendant said that the plaintiff could not take any proceedings having regard to his internment, in other words, to use a phrase which is certainly not grammatical, but which meets the case, that the plaintiff was ex lege and had no locus standi in the courts at all, and that the action ought, therefore, to be dismissed. YOUNGER,

J., made a declaration that the contract between the plaintiff and the defendant was not affected by the plaintiff's internment, but that the plaintiff was entitled to sue upon the contract and maintain an action, and he gave liberty to amend the writ, and so on. From that decision this appeal is brought.

I think that one must be very careful not either expressly or by reasonable implication to say anything inconsistent with the judgment of the full Court of Appeal in *Porter* v. *Freudenberg* (3) delivered by LORD READING, C.J., after the most elaborate discussion with all the other members of the court. What did that case decide? It decided, of course, that for the purpose of trading "alien enemy" does not mean nationality. That is not the test. It decided also by way of approving SARGANT, J.'s judgment in that case that the effect of registration as an alien was that it was a licence by the Crown to the person who takes advantage of that proceeding and registers. It does not decide, nor could it reasonably have been asked to decide, that such a licence cannot be revoked by the Crown. But there is no circumstance here which can be suggested for one moment as evidence of revocation unless it be the internment of the plaintiff which took place in July of this year. We have been referred to a number of authorities, most of which, I will not say all, but by far the majority of which, were referred to and discussed in *Porter* v. *Freudenberg* (3). I deliberately do not intend to go back on anything that was said there, but there is one point at least which may be taken to be new, and it is this. It is said that, although it is true that registration has the effect of a permission from the Crown to remain in this country, yet that permission only lasts so long as the person registered does not molest the Crown and the Crown does not molest him, and it is said that the plaintiff in the present case is plainly molested by being kept in confinement in the Isle of Man under the Internment Order.

I think that there is absolutely no authority for that proposition. One authority was relied upon by counsel—namely, *Wells* v. *Williams* (2), and in that only one passage in the judgment. I do not know whose judgment it is, but the judge presiding in the court said this (1 Ld. Raym. at p. 283):

> "Though the plaintiff came here since the war, yet, if he has continued here by the King's leave and protection ever since, without molesting the government or being molested by it, he may be allowed to sue, for that is consequent on his being in protection."

What is the meaning of the expression "being molested by the government"? I think that it means only that, if it be shown that the licence was withdrawn by the Crown, that is a molestation which would prevent, or might prevent, the plaintiff from suing. I do not rely solely upon that, because, although *Wells* v. *Williams* (2) no doubt is a case of great importance, it is reported in more than one place. In the report in SALKELD the words which I have read, "without molesting the government or being molested by it," are not to be found. The judgment is very short, and I will read it:

> "If an alien enemy comes hither sub salvo conductu, he may maintain an action; if an alien enemy comes hither in time of peace, per licentiam domini regis, as the French protestants did, and lives here sub protectione, and a war afterwards begins between the two nations, he may maintain an action, for suing is but a consequential right of protection."

That judgment seems to me to put *Wells* v. *Williams* (2) on a perfectly satisfactory foundation, and I entirely decline to assume that such an important proposition as counsel for the defendant here relies upon can be established upon one single sentence in a short judgment in LORD RAYMOND'S report. The observation which I have read from that report seems to me to be wholly irrelevant and, if I may respectfully say so, wrong, unless by "molesting" it means only that the Crown thinks fit under its prerogative to revoke the permission which it gave by its licence, in which case the man has no licence.

Then it is said that there is no authority at all which supports the present

appeal, but there is authority against it, and we have been referred to certain cases including the very recent case of *R.* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (4) in the Divisional Court, in which there was laid down a proposition, which I do not for a moment question, that a writ of habeas corpus cannot be taken out by a prisoner of war nor by an interned prisoner. That is all that case decided, and the decision seems to me, if I may respectfully say so, to be perfectly right. Speaking for myself, however, and for myself only, I desire not to be held to accept in its entirety the language used by the two learned judges, BAILHACHE and LOW, JJ. To carry those observations to the extent which it is sought to go—namely, that an interned German, in the circumstances in which the plaintiff in the present case finds himself, is, for the purpose of enforcing civil rights, to be treated as a prisoner of war in the same way as if he had been captured in a German ship or at some point in Flanders or elsewhere—to carry those observations to that extent is altogether—I think, an extension of the doctrine which I cannot in any way countenance.

I do not think that the present case is so bare of authority as was suggested. One of the cases to which our attention has been called is that of *Sparenburgh* v. *Bannatyne* (1). In that case the question was whether a German taken on a privateer vessel, I think it was—which was properly captured by the British government—he being a prisoner, could bring an action for wages due. The court, consisting of EYRE, C.J., and HEATH and ROOKE, JJ., dealt with it in observations which seem to me to be very helpful. EYRE, C.J., said (1 Bos. & P. at p. 168):

> "But a neutral, whether in or out of prison, cannot, for that reason, be an alien enemy. He can be alien enemy only with respect to what he is doing under a local or temporary allegiance to a Power at war with us. When the allegiance determines, the character determines. He can have no fixed character of an alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us; it being only in respect of his being in a state of actual hostility that he was even for a time an enemy at all. As a prisoner of war, how does he differ from any other individual who is in custody for an offence which he has committed, and for which he is answerable?"

A prisoner who may be committed to prison for an offence is not ex lege; he is entitled to assert his civil rights; and it is not right to say that the plaintiff in the present case, although his personal liberty is curtailed by the internment order, as it was, though to a less extent, by the order under the Aliens Registration Act, 1914, has lost all power of enforcing his rights in respect of the trade which he has been carrying on without any possibility of complaint since the agreement entered into by him in March of this year.

The matter does not rest there. HEATH, J., said (ibid. at p. 170):

> "Next as to the general question, the pleas state that the plaintiff was adhering to the King's enemies; they must be proved in all their parts; but a prisoner at war is not adhering to the King's enemies, for he is here under protection of the King. If he conspires against the life of the King it is high treason; if he is killed it is murder; he does not, therefore, stand in the same situation as when in a state of actual hostility. It has been said that a prisoner of war cannot contract; his case would be hard indeed if that were true."

That, I think, must be taken to mean that he can contract, and can assert his rights under the contract.

Later, HEATH, J., said (ibid.):

> "The contract in question was made by the permission of the King's officer, and therefore by the licence of the King, under whose authority the officer may be presumed to have acted."

ROOKE, J., says the same thing (ibid.):

> "An enemy under the King's protection may sue and be sued; that cannot be doubted. A prisoner of war is, to certain purposes, under the King's protection, and there are many cases where he can maintain an action. I will suppose that an officer of high rank on his parol is possessed of a ring or a jewel of great value, on which he wants to raise money, and that a tradesman is so dishonest as to receive it from him and refuse either to advance the money or return the pledge. Surely the court would say that he might recover his ring or his jewel from the tradesman."

If authority be wanted in support of the decision of YOUNGER, J., I think that it is to be found in *Sparenburgh* v. *Bannatyne* (1). But I do not base my judgment upon that point alone. It seems to me to be in accordance with general principles that the restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract entered into by him before the internment. For these reasons I think the appeal fails, and must be dismissed with costs.

BANKES, L.J.—I quite agree. The defendant's argument, as I understand it, is founded upon the fact that the plaintiff in the present case is both an alien enemy and a prisoner of war, and it seems to be suggested that because he is both of these he is in some different position than if he were only an alien enemy or only a prisoner of war. I do not agree with that proposition at all. The plaintiff's position as an alien enemy is rendered quite clear by the authorities. Upon the authority of *Princess Thurn and Taxis* v. *Moffitt* (5) and *Porter* v. *Freudenberg* (3) the plaintiff is in protection, and he is entitled to enforce in the courts of this country any civil rights that he may have. As a prisoner of war the plaintiff's position upon the authorities is quite clear. He is in no worse position than any other individual who is in custody for an offence. Therefore, he is entitled, upon the authorities, to maintain an action. But it is said that there is authority for the proposition that a person who, to use the language of the defendant's counsel, is either molesting the government or being molested by the government is in some different position from that of an alien enemy such as the plaintiff was, or a prisoner of war. In my view, there is no authority for that proposition. The only case in which in any judgment of the court those words are used is *Wells* v. *Williams* (2), as reported in LORD RAYMOND'S reports. As there alone reported, it seems to me that the reference to molestation is a reference to something that may be evidence of a licence, if it had been given, having been withdrawn, or there having been no licence at all. But it is not a separate proposition, nor is it a separate condition, apart from the condition of the alien enemy or the prisoner of war, which would disentitle this plaintiff to enforce any civil rights he may have in a court of law. On these grounds, I agree with the judgment of the court below and with the judgment delivered by the Master of the Rolls.

WARRINGTON, L.J.—The defendant here asserts that the plaintiff is for the time deprived of all civil rights, including particularly the right to institute and maintain an action in these courts. The plaintiff was a native of Germany. On the outbreak of war he complied with the Aliens Restriction Regulations and registered himself. The result of that was that he was for all civil purposes to be treated as either an alien friend, or even as a British subject. But, at any rate, it gave him the right to enter into any otherwise lawful contract and the right to resort to these courts for the purpose of enforcing his rights either under a contract made after the commencement of the war or under a contract made before the commencement of the war.

On July 1, 1915, the plaintiff was interned—that is to say, the King, in the exercise of his right and duty in defence of the realm, thought it desirable for that purpose that he should no longer be at large. It is said that from that moment,

so long as he remains interned, he loses all his civil rights—that is to say, that the first man who comes along might go and live in his house, and, provided he kept outside the criminal law, might take possession of his property and deal with it as he pleased, and the courts of this country could not interfere. It seems to me that such a proposition carries its own answer with it. It is so extravagant that it cannot possibly be the law of this country in time of war. Is it capable of being supported by any authority? In my opinion, clearly not. The right of an alien of enemy birth to sue in this country is derived from the fact that he is resident here under a licence from the Crown. Under a licence to do what? Simply to remain in this country. That is the only licence that is material. Can it be that a licence to remain in this country is recalled by an act of the Crown with compels him to remain in this country? It seems to me again one has only to state the proposition to see that it cannot possibly be so. In my judgment, notwithstanding the internment, the licence to remain in the country, which carries with it his right to prosecute an action in the courts of this country, must remain in force.

I have said this because we have been referred to *R.* v. *Superintendent of Vine Street Police Station, Ex parte Liebmann* (4), before Bailhache and Low, JJ., in which the only question the court had to determine was whether an interned alien was entitled to issue out a writ of habeas corpus—a very different question—and the decision of the court was that an interned alien had no right by means of a writ of habeas corpus to question the authority of the Crown to intern him. But there was no necessity to decide any further question, and I desire to express, as far as I am personally concerned, my disagreement, as at present advised at all events, with the statement made in the judgment of Low, J., that in his opinion there was little doubt that it might be successfully contended that notice of internment was a sufficient revocation of the licence to remain in this country. I cannot agree with that, and I think it desirable, therefore, that I should say so, although our judgment in itself imports a disagreement with that proposition. The authorities that have been cited to us with regard to prisoners of war in olden times only go to this, that the prisoner of war could not issue out a writ of habeas corpus. That nobody now disputes. There is no case which goes so far as the proposition contended for by the defendant in the present case, and, in my judgment, *Sparenburgh* v. *Bannatyne* (1) is a distinct authority to the contrary.

Appeal dismissed.

Solicitors: *A. de Freece & Co.*; *Humphreys, Phillips & Co.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

R. v. SUPERINTENDENT OF VINE STREET POLICE STATION. Ex Parte LIEBMANN

[KING'S BENCH DIVISION (Bailhache and Low, JJ.), August 30 and September 6, 1915]

B

[Reported [1916] 1 K.B. 268; 85 L.J.K.B. 210; 113 L.T. 971; 80 J.P. 49; 32 T.L.R. 3; 25 Cox, C.C. 179]

Alien—Enemy—Civilian—Liability to internment as prisoner of war—Right to writ of habeas corpus.

An alien enemy resident in the United Kingdom who, in the opinion of the C executive government, is a person hostile to the welfare of this country and is on that account interned, may be properly described as a prisoner of war, and be interned as such, although not a combatant or a spy, and, being a prisoner of war, he is not entitled to obtain a writ of habeas corpus.

The applicant was born in Germany in 1868 of parents who were German subjects and he resided in Germany. In 1889 he came to England for busi- D ness purposes, and had since carried on business in England. In 1890 he became denationalised in Germany, obtaining a formal discharge from German nationality, but he never became naturalised as a British subject. In August, 1915, he was interned by order of the executive government as a prisoner of war. On an application for a writ of habeas corpus for his discharge,

Held: although the applicant had obtained a formal discharge from German E nationality, he had not become a naturalised British subject, and as, under German law, he had not thereby become entirely divested of the rights of a natural-born German, he was, therefore, an alien enemy and could be interned as a prisoner of war; accordingly, the application for a writ of habeas corpus would be refused.

Ex parte Weber (1), [1916] 1 K.B. 280, n., followed.

F **Notes.** Considered: *Schaffenius* v. *Goldberg*, ante, p. 387. Followed: *R.* v. *Knockaloe Camp Commandant, Ex parte Forman* (1917), 87 L.J.K.B. 43. Distinguished: *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67. Considered: *R.* v. *Home Secretary, Ex parte L.*, [1945] K.B. 7; *Netz* v. *Ede*, [1946] 1 All E.R. 628. Approved: *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 2 All E.R. 434. Referred to: *Lowenthal* v. *A.-G.*, [1948] 1 All E.R. 295.

G As to habeas corpus, see 11 HALSBURY'S LAWS (3rd Edn.) 24 et seq.; and for cases see 17 Digest (Repl.) 420.

Cases referred to:

(1) *Ex parte Weber*, [1916] 1 K.B. 280, n.; 80 J.P. 14; 31 T.L.R. 602; 59 Sol. Jo. 692; affirmed, [1916] 1 A.C. 421; 85 L.J.K.B. 944; 114 L.T. 214; H 80 J.P. 249; 32 T.L.R. 312; 60 Sol. Jo. 306; 25 Cox, C.C. 258, H.L.; 2 Digest (Repl.) 214, *279*.

(2) *R.* v. *Schiever* (1759), 2 Burr. 765; 97 E.R. 551; 2 Digest (Repl.) 216, *290*.

(3) *Furly* v. *Newnham* (1780), 2 Doug. K.B. 419; 99 E.R. 269; 2 Digest (Repl.) 244, *463*.

(4) *Three Spanish Sailors' Case* (1779), 2 Wm. Bl. 1324; 96 E.R. 775; 2 Digest I (Repl.) 244, *462*.

(5) *Sylvester's Case* (1703), 7 Mod. Rep. 150; 87 E.R. 1157; 2 Digest (Repl.) 250, *507*.

(6) *Princess Thurn and Taxis* v. *Moffitt*, ante, p. 301; [1915] 1 Ch. 58; 84 L.J.Ch. 220; 112 L.T. 114; 31 T.L.R. 24; 59 Sol. Jo. 26; 2 Digest (Repl.) 242, *443*.

(7) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel and Rosenfeld, Re Merten's Patents*, post; [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R. 162; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; 2 Digest (Repl.) 242, *444*.

Also referred to in argument:

Wolfe Tone's Trial (1798), 27 State Tr. 613; 39 Digest 343, *286*.

R. v. *Superintendent of Albany Street Police Station, Ex parte Carlebach*, [1915] 3 K.B. 716; 84 L.J.K.B. 2121; 113 L.T. 777; 31 T.L.R. 634; 25 Cox, C.C. 108; 2 Digest (Repl.) 199, *185*.

Application for a writ of habeas corpus.

On July 31, 1915, the applicant, Alfred Liebmann, was served by a superintendent of Police with the following notice:

"Take notice that it is intended to intern you as a prisoner of war on Tuesday, the 3rd day of August 1915";

and this notice was issued by authority of the Home Secretary. Under this notice the applicant was interned on Aug. 17. On an application being made on behalf of the applicant to Low, J., in chambers, the judge made an order on Aug. 20, 1915, that all parties concerned should attend the judge in chambers on Aug. 24, 1915

"to show cause why a writ of habeas corpus should not issue directed to the Superintendent of Police, Vine Street Police Station, Piccadilly, W., to have the body of Alfred Liebmann before a judge in chambers at the Royal Courts of Justice, London."

This summons, issued by the judge in chambers, was adjourned, and it was afterwards arranged that it should come before a Divisional Court, and that, for the purposes of the case, the summons should be treated as the granting of a rule nisi for a writ of habeas corpus.

The Solicitor-General (*Sir Frederick E. Smith*) and *Branson*, for the Crown, showed cause against the rule.

T. Healy, K.C. (*Frampton* with him), in support of the rule.

Cur. adv. vult.

Sept. 6. The following judgments were read.

BAILHACHE, J.—This is an application for a writ of habeas corpus by one Alfred Liebmann, who is interned at Vine Street Police Station. He was interned on Aug. 17, 1915, in pursuance of a notice sent to him by a superintendent of the Metropolitan Police, which, so far as is material, is in these terms:

"Take notice that it is intended to intern you as a prisoner of war on Tuesday, Aug. 3, 1915."

This notice was issued, we are told, by authority of the Home Secretary. The facts are that the applicant was a German subject born in Germany in 1868. He came to England for business reasons in 1889, and has resided and carried on business in England ever since. In May, 1890, he obtained a formal discharge from German nationality. He never became naturalised as an English citizen. The case was treated by consent as if a rule nisi had been granted, and the Crown by the Solicitor-General showed cause against the rule. In so doing, the Solicitor-General took the preliminary point that no writ of habeas corpus will issue in the case of a prisoner of war, and alleged that the appellant is a prisoner of war. We decided to hear argument on the whole case before dealing with this preliminary objection, and the Solicitor-General then made the further point that the Home Secretary in interning the applicant was acting in exercise of the royal prerogative to imprison alien enemies in time of war, and that the applicant was an alien enemy. Counsel who appeared for the applicant argued that the applicant was neither a prisoner of war nor an alien enemy, and further denied the existence of any such royal prerogative as that asserted. It appeared from the argument on behalf of the Crown that the contention that the Crown could, by virtue of its inherent prerogative, imprison civilians during a time of war was

not limited to alien enemies, although it was not necessary to claim any higher or further prerogative in this case.

If the preliminary objection raised by the Crown is sound, the second point, which is one of supreme constitutional importance, does not arise. It will be convenient, therefore, to consider the preliminary objection first. In so doing, the question whether the applicant is an alien enemy is so closely connected with the question whether he is a prisoner of war that it is necessary to discuss and determine both these points. I will consider in the first place whether the applicant is an alien enemy. He denies it, and claims that he is a person of no nationality. I have had the advantage of reading the judgment about to be delivered by Low, J. He has so fully dealt with this point that it is sufficient for me to say that I agree with the conclusion at which he has arrived. I agree, too, that this point is covered by the decision of the Court of Appeal in *Ex parte Weber* (1). There is a distinction between the two cases in that, in *Weber's Case* (1) nationality was lost by long residence abroad, while in this case the applicant obtained a formal discharge from German nationality, but, in my judgment, this distinction makes no difference in principle. The applicant is an alien enemy.

Next, is the applicant a prisoner of war? It is at first sight somewhat startling to be told that a civilian resident in this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war. One generally understands by a prisoner of war a person captured during warlike operations by the naval or military forces of the Crown, or, perhaps, a civilian arrested as a spy. I think, however, that the courts are entitled to take judicial notice of certain notorious facts which may be summarised thus: There are a large number of German subjects in this country. This war is not being carried on by naval and military forces only. Reports, rumours, intrigues, play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only refer to wireless telegraphy, signalling by lights, and the employment, on a scale hitherto unknown, of carrier pigeons. Spying has become the hall-mark of German "kultur." In these circumstances, a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movement of submarines and Zeppelins—a far greater danger, indeed, than a German soldier or sailor. I have come to the conclusion that a German resident in the United Kingdom, who, in the opinion of the executive government, is a person hostile to the welfare of this country and is on that account interned, may properly be described as a prisoner of war, although not a combatant or a spy.

I have gone at such length into this part of the case for several grave reasons. It is, I believe, settled law that no writ of habeas corpus will be granted in the case of a prisoner of war. The cases cited on behalf of the Crown—*R.* v. *Schiever* (2); *Furly* v. *Newnham* (3); and the *Three Spanish Sailors' Case* (4)—are conclusive on the point. If, therefore, the applicant is in fact a prisoner of war, as I hold that he is, his application must fail. Another reason is that there is, I understand, no precedent, except in the case of a spy, which covers the case of a civilian subject of a Power at war with this country. The cases above referred to are all cases of combatants, prisoners of war in the ordinary acceptation of that term. As the preliminary objection succeeds it is unnecessary to say more; but these courts are specially charged to safeguard the liberty of the subject as one of their most sacred duties. The courts owe that duty not only to the subjects of His Majesty, but also to all persons within the realm who are under His Majesty's protection and are entitled to resort to these courts to secure for them any rights which they may have, and this whether they are aliens or alien enemies. I think it right, therefore, to add that, deeply impressed as I am with the sanctity of the liberty of the subject, I cannot forget that above the liberty of the subject is the safety of the realm, and I should be prepared to hold, as at present advised, that, when the internment of an alien enemy is considered by the executive government charged with the protection of the realm desirable in

the interests of the safety of the realm, and the government thereupon interns such alien enemy, the action of the government in so doing is not open to review by the courts of law by habeas corpus.

I trust that I have throughout made it quite clear that I have been confining my observations to the case of alien enemies. I desire with all the emphasis I can command to state expressly that I am not dealing with the case of British subjects or with aliens the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever on any class of persons other than alien enemies. I desire to say this because there were some observations by the counsel for the Crown as to the extent of the royal prerogative to which I am not prepared to assent.

I cannot leave this case without a reference to counsel for the applicant's argument that there can be no prerogative of the Crown to intern alien enemies, because, if there were, there would be no need for emergency legislation giving the King power to restrict the movements of aliens, to compel them to register themselves, and the like. His argument was that, if there is this inherent power in the Crown to imprison, there must be also inherent the power to do all the lesser acts provided for by the emergency legislation. This short résumé of counsel's argument scarcely does it justice. I felt the force of it, and must ask counsel and his client to believe that I have fully considered it. I do not know why express power to intern alien enemies was not included in the emergency legislation, or why there has been no Order in Council dealing with the subject as it now arises, but I notice that the emergency legislation reserves all the powers of the Crown. The rule nisi must be discharged.

LOW, J., stated the facts, and continued: The first question we have to determine is whether the applicant is an alien enemy. He was born at Mannheim in 1868. He resided in Germany until 1889, serving a year in the German Army. In 1889 he came to England, and has resided here ever since. In 1890 he obtained a document purporting to discharge him from German nationality, but he has taken no steps to naturalise himself here. In August, 1914, he registered himself as an "alien enemy" under the Aliens Restriction Order. He states that he did this although he knew that he was not a German subject, but, as he could not at the time find his document of discharge, he registered himself as a precaution, that he subsequently found the document, and applied to the police to cancel the registration, but they refused to do so. He also says that later he applied to the Home Office Advisory Committee to exempt him from internment, and that that application was refused. The discharge from German nationality to which I have referred is said to have been granted under the provisions of a German law of 1870, which law was amended by another German law of 1913. The effect of both these enactments has been already considered by the Court of Appeal in *Ex parte Weber* (1), and in my opinion, that decision covers this question. It is clear on the examination of these laws that they attempt to place what is called in the later statute "a former German" in a privileged position, and that such a person can recover full German nationality (see para. 13 of the Law of 1913) without even going back to Germany at all, whereas "a foreigner" (see para. 8) can only obtain German nationality after settling in Germany. It is clear, therefore, that this applicant has not become entirely divested of the rights belonging to a natural-born German, and, therefore, following the decision of the Court of Appeal, I hold that the applicant is an alien enemy.

The second question is—is he a prisoner of war? The authorities cited by counsel for the Crown—*R.* v. *Schiever* (2), *Furly* v. *Newnham* (3), and the *Three Spanish Sailors' Case* (4)—show, if authority were required, that a writ of habeas corpus cannot be granted on the application of a prisoner of war, even for the purpose of giving evidence, much less in order to obtain his release. We were informed that there are no other authorities, and that the question what, in the

circumstances of any particular case, constitutes a prisoner of war is one of first impression. Of course, in cases of actual combatants, such as in the cases cited, no question can arise, but, in my opinion, to show that a man is a prisoner of war it is not necessary for him to have been an actual combatant. War at the present moment is not, as it was in olden times, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the fields of possible hostility that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put on the exercise of acts of hostility, and real danger to the realm may, therefore, exist, although impossible of discovery, at distances far from where the actual clash of arms is taking place. In addition to this, methods of warfare or methods ancillary to warfare have come into practice on the part of our foes which involve the honeycombing of the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war. In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul, it would, I think, be idle to expect the Executive to wait for proof of an overt act or for evidence of an evil intent. In my opinion, this court is entitled to take judicial cognisance of these matters, and, in a question so greatly involving the security of the realm, to say that, where the Crown in the exercise of its undoubted right and duty to guard the safety of all represents to this court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and, accordingly, within the terms of the notice served in this case, to intern such alien enemy as a prisoner of war, he must be regarded for the purpose of a writ of habeas corpus as a prisoner of war.

With regard to the third question, as to the prerogative of the Crown to arrest an alien enemy, I have really answered almost as much of it as is necessary to deal with the present case when I have been dealing with question 2. I have no doubt at all that such action is quite within the Crown's prerogative. At common law an alien enemy had no rights (see *Sylvester's Case* (5)), and he could be seized and imprisoned and could have no advantage of the law of England. This position, however, has been softened by custom and by the decision of the courts, and the judgment of SARGANT, J., in *Princess Thurn and Taxis* v. *Moffitt* (6), approved by the Court of Appeal in *Porter* v. *Freudenberg* (7), shows that an alien enemy registered under the Aliens Restriction Act, 1914, as this applicant is, is entitled to sue in the King's Courts (which would, I suppose, include such an application as the present), as he is resident here by tacit permission of the Crown, and so is sub protectione domini regis. He is, therefore, in a similar position to an alien enemy resident here under licence from the Crown. That licence, however, can be terminated at any time by the Crown, and, although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the licence. Of course, the alien enemy is protected from outrage, because in such case it is not the alien who invokes the aid of justice, but the King in vindication of his peace. Whether his licence is revoked or not, I see no reason why it should protect him in the present circumstances from being made a prisoner of war.

As this court is especially charged as between the Crown and the subject to exercise the greatest care in safeguarding the subject's liberty, I desire, having regard to some of the arguments which were advanced in this case on behalf of the Crown, and which were strongly commented on by learned counsel for the applicant, to guard myself from being supposed to agree with all those arguments, and particularly to say that nothing in this judgment is intended to apply to the case, should it arise, of a British subject or of a friendly alien, but only to the case of an alien enemy. I should also add that, as I understood the argument

on behalf of the Crown, it was not sought to justify this arrest under any of the emergency statutes passed since the commencement of the war or the regulations made under them, nor was it necessary to do so, and I agree with the contention of counsel for the Crown that the inherent power of the Crown to deal with alien enemies is sufficiently saved by these enactments.

I am of opinion that this rule must be discharged.

Rule discharged.

Solicitors: *Cruesemann & Rouse; Treasury Solicitor.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

SMITH, CONEY AND BARRETT *v.* BECKER

[Court of Appeal (Lord Cozens-Hardy, M.R., Swinfen Eady and Phillimore, L.JJ.), January 11, 12, 1915]

[Reported [1916] 2 Ch. 86; 84 L.J.Ch. 865; 112 L.T. 914; 31 T.L.R. 151]

Contract—Illegality—Alternative methods of performing contract—One method illegal, alternative method legal.

By a contract dated Aug. 1, 1914, which incorporated an arbitration clause, buyers bought from sellers, both parties being British subjects, a quantity of sugar to be delivered f.o.b. Hamburg during that month. On Aug. 4 war broke out between Great Britain and Germany. The contract contained a provision that in the event of such a war the contract would be deemed to be closed at certain official quotations of the price of sugar and any sum found to be due from the sellers to the buyers would be paid. On a question whether the declaration of war rendered the contract illegal and void so that the buyers would be unable to submit a dispute to arbitration under it,

Held: there being an alternative to the obligation of the sellers to deliver the sugar at Hamburg, namely, to pay the buyers a sum of money, the contract was not rendered illegal by the outbreak of war, and the arbitration clause it contained was effective.

Notes. Considered: *Taylor & Son* v. *Barnett*, [1953] 1 All E.R. 843. Referred to: *Jager* v. *Tolme and Runge and London Produce Clearing House*, [1916] 1 K.B. 939; *Blackburn Bobbin Co.* v. *Allen* (1918), 87 L.J.K.B. 1085.

As to illegality of contracts, see 8 Halsbury's Laws (3rd Edn.) 125 et seq.; and for cases see 12 Digest (Repl.) 263 et seq.

Cases referred to:

(1) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

(2) *Kitts* v. *Moore & Co.*, [1895] 1 Q.B. 253; 64 L.J.Ch. 152; 71 L.T. 676; 43 W.R. 84; 39 Sol. Jo. 96; 12 R. 43, C.A.; 2 Digest (Repl.) 498, *469*.

Also referred to in argument:

Cunningham v. *Dunn* (1878), 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 631; 3 Asp.M.L.C. 595, C.A.; 12 Digest (Repl.) 440, *3349*.

Jackson v. *Union Marine Insurance Co., Ltd.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, *3339*.

Ford v. *Cotesworth* (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188;

A 23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 12 Digest (Repl.) 439, *3348*.

Couturier v. *Hastie* (1856), 5 H.L.Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 2 Jur.N.S. 1241; 10 E.R. 1065, H.L.; 12 Digest (Repl.) 414, *3222*.

Appeal from orders of WARRINGTON, J., made on a motion by the plaintiffs in an action brought by them for an injunction restraining the defendants from proceed-
B ing under an arbitration. HIS LORDSHIP refused to grant an injunction, and, on the application of the defendants, made an order staying the action.

Maurice Hill, K.C., and *Devonshire* for the plaintiffs.
Clauson, K.C. (with him *J. M. Gover*), for the defendants.

LORD COZENS-HARDY, M.R.—This is an appeal from two orders made by
C WARRINGTON, J., refusing, in the first place, an injunction against proceeding in an arbitration, and, in the next place, granting an order on a summons to stay proceedings in this action.

The plaintiffs and defendants are both British subjects; there is no question of alien enemies. They are both dealers in sugar. In 1914, before the war began, the plaintiffs had contracted to buy a large quantity of sugar at a price very
D much higher than it was at the end of July, when there was a great fall in the market. The sugar was to be delivered at Hamburg. They were anxious to cover their liability in respect of that contract. That contract was for delivery in the month of August. They, therefore, sought to and did cover their liability by selling to the defendants an equivalent amount also for August.

Before reading the contract, or the material parts of the contract, I ought
E to say that the rights of the parties here are dependent upon the terms of what I may call a clearing-house arrangement, an arrangement of a complicated nature, under which a number of bargains for the sale and purchase of sugar are ultimately settled by the payment of differences. In my view, nothing turns upon the details of that arrangement, although I may have to refer to it. The contract in question is dated Aug. 1, 1914, just before the declaration of war, and it is in
F these terms:

> "We have this day bought of you for our own account 6,500 bags beetroot sugar . . . Delivery August, 1914. Price 7s. per cwt. net,"

which was a great deal less than the price in the contract for the purchase by the plaintiffs. It is then declared to be

G
> "subject to the regulations and conditions of the London Produce Clearing House Limited for sugar future delivery business, and subject to war clause as printed overleaf."

The contract contained a clause providing that any dispute arising under it should be referred to arbitration. In this action the plaintiffs sought a declaration that the contract which I have just read was illegal by reason of the declaration of
H war between Great Britain and Germany on August 4. If it was illegal, then any question of arbitration under the contract would fall with it. It is also said that if the contract is not tainted with illegality, still, by reason of an embargo, the nature and extent of which are left exceedingly obscure upon the evidence—an embargo put by the German government upon the export of sugar from Hamburg on July 31—the contract, even though not so illegal, ought not to be en-
I forced, because it must be taken to have been an implied term by both parties to the contract that it should have been possible to export the sugar, and that, somewhat on the principle of *Taylor* v. *Caldwell* (1) and other well-known cases, the contract, though not illegal, was affected by some definite vice (shall I say?) which prevented any right being secured by either party to it.

As to the first point, if the plaintiffs are right upon that, it is quite clear that the action ought to go on, and that the order made by WARRINGTON, J., cannot be sustained. But, in my opinion, that is really not an arguable point. It seems to me perfectly clear that there was nothing illegal in this contract, and

nothing to justify the contention of illegality, for what was the contract? Putting it shortly it was this: "We sell you a lot of sugar at Hamburg, to be delivered f.o.b. either on board ship or in warehouse, or if by reason of war" (under a clause to which I shall now call attention) "that cannot be done, we will pay you a sum of cash." What is the difficulty? There is no illegality at all. It is a contract with two branches, two alternatives: "If we cannot deliver you the specific goods, we will pay you a sum of cash." On the face of the contract that is its true construction and effect, and there is absolutely nothing in the contention of illegality. The war clause which was expressly incorporated in the contract, was as follows:

> "In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed, shall, on official notice being given that such a state of war exists, be deemed to be closed at the average quotation of the official calls held on the sixth working day counted backwards from the day when such official notice is given (not counting the day of official notice nor any date on which there is no official quotation to count as a working day), and accounts shall be made up with and between the contracting parties, who shall accept such settlement as complete and final; all differences arising therefrom shall be due immediately. . . . The guiding dates to make the war clause operative will be the declaration of war of either belligerent or a proclamation or other notification by the British government in the case of a war between Great Britain and Germany, whichever occur first, and/or the British declaration of neutrality in the case of a war between Germany and another Power."

I find, therefore, on the face of the contract that the outbreak of a state of war was contemplated, and in that event the second alternative of the contract took effect. There was no obligation to deliver the sugar at Hamburg, but, instead of that, there was an obligation to pay a sum of cash ascertained in the manner here stated.

[His Lordship dealt with a point raised by the defendants relating to an embargo placed by the German government on the export of sugar from Germany which does not call for report, and continued:] The second point is this. If there is no ground for saying that the contract is void, or that there is no contract at all, what are the provisions contained in the contract? For that purpose, of course, it is necessary to look at this extraordinary code of many hundred clauses [the regulations of the Sugar Association of London] which is supposed to be incorporated in every contract for the sale and purchase of sugar. There are upwards of 500 clauses. If I refer to r. 351, I find these words: "The committee is the referee of all disputes." The next rule—352—is:

> "Any disputes that may arise out of or in relation to any clearing contract or out of or in relation to any alleged contract . . . shall be referred to the committee."

When you get to the next rule there is an express stipulation that the submission or reference is to be in writing and shall be made a rule of court. It is provided at the end of r. 353 as follows:

> "the obtaining of an award shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any . . . contract."

So that there is as stringent and wide an arbitration clause as it is possible to imagine, and expressly makes the obtaining of an award a condition before which no action can be maintained by either party to the contract. When once we have got to the point that there is a contract which confers rights upon both parties, it seems to me that the case is really at an end. The parties have in terms agreed that their mutual rights and obligations shall be settled by arbitration, and in no other way. It may or may not be a very foolish thing to

have such a term. It is not for me to say what my own view may be in the matter. But as a matter of business I suppose these gentlemen engaged in trade prefer such a tribunal to the courts. It is quite clear that it is no objection to the enforcement of a clause like this that there are difficult questions of law, and may be difficult questions of fact to decide. The parties have selected the tribunal, and in the absence of very special circumstances the court of first instance ought to hesitate greatly before allowing the arbitral tribunal to be in any way interfered with, and certainly when the judge in the court below has exercised judicially his discretion the Court of Appeal ought to think once and think twice before it interferes with the discretion. In my opinion, there is nothing in the present case which justifies a contention that this is not a fit question to be decided by the arbitrators. It is a question which falls within the express language of the arbitration clause, and, in my opinion, it would be very wrong for us to say that this ought not to go to the tribunal which the parties themselves have selected, but ought to be kept in this action in some form. In my opinion, the judgment of WARRINGTON, J., was perfectly right on both points, and this appeal must be dismissed with the usual consequences.

SWINFEN EADY, L.J.—I am of the same opinion. The contract in question is a contract for the sale of a quantity of beet sugar for future delivery—August delivery—and the contract embodies the

> "rules, regulations, and byelaws of the Sugar Association of London and of the Clearing Department thereof."

Further it is

> "subject to the regulations and conditions of the London Produce Clearing House, Ltd., for sugar future delivery business, and subject to war clause as printed overleaf."

The conditions embodied include a submission or reference to arbitration. They provide that disputes are to be settled by arbitration, and then comes r. 353 [supra]. The plaintiffs claim an injunction, but if the contract is subsisting an award is a condition precedent to either party suing the other. The contract was for future delivery, and it is now disputed that under the terms of such contract the sellers had the whole of August in which to deliver the sugar, or to tender the sugar for delivery. The buyers were not entitled to require delivery at any particular date in August. The option lay with the sellers during the whole of the month including the last day when they would tender the sugar. When the sugar was tended, then the buyers had an option with regard to the mode of delivery. It was open to them to give either practicable shipping instructions—that would be to take delivery in the port of Hamburg f.o.b. a ship at Hamburg—or practicable storing instructions, and then the rules define what "practicable storing instructions" meant. It means "the naming of a warehouse within the limits of port of shipment which can receive the sugar within eight days from the date of instructions." Then "At Hamburg only such warehouses allowed as have been approved by the General Agency and are on the list authorised by them." In other words, they can deliver on board a ship at Hamburg or in a permitted warehouse at Hamburg with a view to the sugar being warehoused.

[HIS LORDSHIP dealt with the point relating to the embargo, and continued:] There is nothing illegal in the provision in the contract that in the event of war the contract shall be deemed closed on certain terms, with a payment of difference resulting. There is nothing illegal in such a stipulation. It is a perfectly valid stipulation, providing for an event which actually happened. In those circumstances I am of opinion that whatever the rights of the parties may be, whatever disputes may arise out of the contract, they are within the arbitration clause. The contract is a subsisting contract for the purpose of going to arbitration, and the arbitrators are the proper tribunal. The result, therefore, is that there is a legal subsisting agreement to refer disputes to arbitration, and under

which arbitration is a condition precedent to any action being brought. It, therefore, follows that the disputes must be referred to arbitration and the action stayed. For these reasons I am of opinion that the judge below was right, and that the appeal fails.

PHILLIMORE, L.J.—I agree. The award which the defendants are seeking to get is one from an arbitral tribunal, being the committee of the council of the Sugar Association of London, and is one which will be obtained, if at all, under rr. 352 and 353 of the Rules and Regulations of the Sugar Association of London. I find under rr. 352 and 353, which are incorporated in this contract, an ordinary provision for reference to arbitration before a committee of the council of the association of people engaged in the beet sugar trade.

There is no reason on the face of those rules why arbitration should not be sought. The plaintiffs' first point, however, is that there is no contract, and, if no contract, then, of course, no arbitration clause. They are entitled to submit that decision to the courts, and if they can succeed in maintaining it they are entitled, no doubt, to an injunction restraining arbitration, but I think they have mistaken the force and effect of *Kitts* v. *Moore & Co.* (2) when they say that it is enough for them in these circumstances to show a primâ facie possibility that the contract cannot be enforceable. It either may originally have been invalid or have become unenforceable by reason of the destruction of the subject-matter of the contract or otherwise. That is a state of things supervening which makes it impossible of execution or that the contract was made under such a common mistake of fact as to entitle either party to recission. It is quite true that there are strong expressions in *Kitts* v. *Moore & Co.* (2) as to the practice of the court in granting injunctions when there is a probability, without a certainty, that the contract may turn out to be no contract; but *Kitts* v. *Moore & Co.* (2) was not a case like this, where the obtaining of an award is a condition precedent to any right of recovery, and it would be wrong, in my view, to apply *Kitts* v. *Moore & Co.* (2) in all its force to such a case. I think, therefore, that the plaintiffs here had to make out to our satisfaction that there was no contract.

How have they sought to do that? First of all, they suggested that the contract was an illegal contract or involved an illegality. I think they failed to prove that. There is nothing to prevent two subjects of the King contracting with regard to goods which are in foreign parts in such terms as these: "I will sell and you will buy. I will deliver and you will take delivery, but if war between the country where the goods are and our own country, or war between the country where the goods are and some other country, prevents my delivering and your taking delivery, nevertheless one or other of us shall pay to the other a liquidated sum in respect of our original contract to sell and to buy." Such a contract is a possible contract, and there is no taint of illegality in it so far. At the time when the contract was made, the two nations, Great Britain and Germany, were not at war, and that being so, it was legal to make an arrangement under which goods in Germany should be sold and bought, delivered and received, or, in the alternative, if it became impossible or inconvenient by reason of war with this country or with another country to carry out the contract, that a sum of money should be paid as between the parties.

[His Lordship dealt with the embargo point, and continued:] The only point left to consider is whether there are special reasons for preventing the parties from applying to that domestic tribunal to which they have agreed. There are cases in which the court has exercised a discretion where it has appeared that there is nothing but a point of law which will have to be decided, and where, if the matter goes to arbitrators, the arbitrators could be compelled to send the case back to the courts of law by one or other of the procedures known under the Arbitration Act, 1889. But to begin with, in this particular case the parties have intended if they lawfully can to make the decision of their domestic tribunal conclusive and independent of any act by a court of law; and, secondly, and this is

A the matter which weighs most with me, an arbitration is necessary whatever view is taken, because an award by the arbitrators is a condition precedent to the defendants' right to recover that sum of money to which they claim to be entitled. When the court has exercised its discretion, and has refused to stay an action because it sees that the matter is merely a point of law, it has done so upon the principle that it is a more convenient mode of trial to have the matter B tried directly in the action instead of indirectly by an arbitration and the statement of a case. But it has never refused to stay an action where it is obvious that the case must go to arbitration; and the case must go to arbitration where an award is a condition precedent.

The result is that the application for an injunction unquestionably fails, and that the order to stay was rightly made, because the only tribunal which can determine C this matter is the tribunal which the parties have contemplated.

Appeal dismissed.

Solicitors: *Rawle, Johnstone & Co.*, for *Smith, Dickinson & Co.*, Liverpool; *Rehder & Higgs.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

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SWALLOW *v.* LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (Ridley, Lush and Low, L.JJ.), December 10, 1915]

[Reported [1916] 1 K.B. 224; 85 L.J.K.B. 234; 114 L.T. 368; 80 J.P. 164; 32 T.L.R. 181; 14 L.G.R. 301; 25 Cox, C.C. 295]

F *Weights and Measures—Coal—Weighing on delivery—Request to driver of coal cart by officer of local authority to weigh coal—Refusal to do so or assist officer—"Obstruction"—Weights and Measures Act*, 1889 (52 & 53 *Vict.*, *c.* 21), *s.* 27 (2).

The appellant, driver of a coal cart, was requested by an officer of the respondents to place the coal he was delivering on a weighing machine. He G refused to do so and also refused to assist the officer to do so, but he did not object to the officer weighing the coal. An information was preferred against him under s. 27 (2) of the Weights and Measures Act, 1889, for having obstructed the weighing of the coal and he was convicted.

Held: section 27 did not oblige the appellant to weigh the coal, and, therefore, his refusal was not an "obstruction" under sub-s. (2), and he was H wrongly convicted.

Notes. As to the application of the Weights and Measures Acts to coal, see 33 HALSBURY'S LAWS (2nd Edn.) 684–690 and as to the weighing of coal see ibid., 688; for the Weights and Measures Act, 1889, s. 27, see 26 HALSBURY'S STATUTES (2nd Edn.) 1269; and for cases see 44 DIGEST 138 et seq.

I Cases referred to:

(1) *Alty* v. *Farrell*, [1896] 1 Q.B. 636; 65 L.J.M.C. 115; 74 L.T. 492; 60 J.P. 373; 12 T.L.R. 346; 40 Sol. Jo. 460; 18 Cox, C.C. 321, D.C.; 44 Digest 141, *87.*

(2) *Kent County Council* v. *Humphrey*, [1895] 1 Q.B. 903; 64 L.J.M.C. 190; 72 L.T. 563; 59 J.P. 520; 11 T.L.R. 386; 43 W.R. 506; 39 Sol. Jo. 470; 18 Cox, C.C. 163; 15 R. 414, D.C.; 44 Digest 141, *86.*

Case Stated by a metropolitan police magistrate sitting at Clerkenwell.

On May 3, 1915, Edward Henry Pineles, an officer of the respondents, the

local authority within s. 27 of the Weights and Measures Act, 1889, saw the appellant in charge of a van containing a load of coal in sacks, close to the premises of the Cannon Brewery Company, which coal the appellant was about to deliver there. Pineles required that the coal should be weighed by a duly stamped instrument which he had with him, and he requested the appellant to place the coal on the scale of such instrument. The appellant refused to put the coal on the scale or to assist the man by whom Pineles was attended in so doing, but raised no objection to Pineles himself or by his man placing the coal on the scale and weighing it.

The magistrate was of opinion that the word "require" in s. 27 implied a command, and the refusal to obey was disobedience to a lawful order which on the facts mentioned amounted to an unlawful obstruction of the officer of the local authority, and accordingly convicted the appellant and fined him 40s.

By the Weights and Measures Act, 1889, s. 27:

"(1) Any seller or purchaser of coal, person in charge of a vehicle in which coal is carried, inspector of weights and measures, or other officer appointed for the purpose by the local authority, may require that any coal or any vehicle used for the carriage of coal in bulk be weighed or reweighed by any weighing instrument stamped by an inspector of weights and measures. . . . (2) If any person obstructs any weighing or reweighing authorised by this section he shall be liable to a fine not exceeding five pounds.

Disturnal, K.C. (*Morle* with him), for the appellant.
Daldy for the respondents.

RIDLEY, J.—The appellant, who was in charge of a vehicle containing coal, did not, when required to do so by the respondents' officer, assist in the weighing of the coal, but simply stood by and did nothing. The magistrate held that the appellant's refusal to assist in the weighing of the coal amounted to an "obstruction" of the weighing within s. 27 (2) of the Weights and Measures Act, 1889. The difficulty in the way of counsel for the respondents is that the appellant did nothing to prevent the weighing of the coal. If the statute had made it an offence to refuse to weigh the coal, the appellant would then have been in the same position as is the seller of bread under s. 32; and in that case it might be said that to refuse to weigh might be obstructing the weighing. But s. 27 does not go as far as s. 32; the legislature appears to have deliberately refrained from saying that the person in charge of a vehicle and delivering coal is to take part in the weighing thereof. Section 27 contains a provision that the seller of coal or person in charge of a vehicle in which coal is carried shall not be required to go beyond a certain distance when the coal is to be weighed. There is no connection between that and the weighing, which is not by this section put upon the carman at all. The legislature has not enacted that it is an obstruction within the proper meaning of that word for the carman to stand by and do nothing. In my opinion the appellant committed no offence when he simply stood by and refused to assist in the weighing. That being so, I think the magistrate was wrong, and that the conviction must be quashed.

LUSH, J.—If the legislature had intended to impose upon the carman the duty of weighing coal—by that I mean the taking of an active part in the weighing—and had intended to make him liable to a penalty if he refused, it would have been very easy to use language enacting this in clear terms. If one looks at s. 25, where the legislature has put upon the seller the duty of weighing coal it has said so in terms. That section deals with the sale in small quantities of coal for delivery at the place where it is kept for sale, and it says that the seller shall, if so required by the purchaser or inspector, weigh any coal before the sale or delivery thereof. Contrast that language with that of s. 27, where not a word is said to the effect that the seller by his servant shall weigh the coal. Again, the language of s. 27 (2), the subsection which imposes the penalty, is not that if any

A person refuses to weigh, but that "if any person obstructs any weighing or re-weighing authorised by this section he shall be liable to a fine." In my opinion, in order to expose a person to the penalty under s. 27 (2) there must be an active obstruction by him of the person who is weighing the coal. Here there was no obstruction if by obstruction is meant actively putting an obstacle in the way of the person wishing to weigh the coal. Although it is conceivable that the B expression "obstruction" might have been used in reference to what the appellant did, if a duty to weigh had been cast upon him, it is impossible to say, where no duty to weigh is imposed upon him, that he is guilty of obstructing the weighing by refusing to assist in the weighing. Counsel for the respondents referred to the case of *Alty* v. *Farrell* (1). There a local authority made a byelaw which required every person in charge of a vehicle carrying coal for sale in small quanti- C ties to carry a perfect weighing instrument of an approved form and reweigh the coal on being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable. The court held that the byelaw was unreasonable. LORD RUSSELL OF KILLOWEN, C.J., was content to put his judgment upon the ground that the byelaw might necessitate several weighings, and also that to authorise any constable to require D the carman to weigh the coal was unreasonable. WRIGHT, J., expressed a doubt whether the byelaw was good on other grounds. But if one looks at the earlier case of *Kent County Council* v. *Humphrey* (2) which was cited in *Alty* v. *Farrell* (1), it will be seen that it was thought doubtful whether the power to make a byelaw that the carman should weigh the coal was intra vires. There the byelaw said that

E > "every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall re-weigh the coal on being requested to do so."

F The byelaw therefore imposed a duty upon the carman to re-weigh. It is true that the court did not say that it was ultra vires. CHARLES, J., held that the first part of the byelaw was good, but he said ([1895] 1 Q.B. at p. 906):

> "It is not necessary for us to give any opinion as to whether the latter clause in the byelaw may or may not be ultra vires, because the earlier clause, on which the charge against the respondent was founded, is clearly good."

G WRIGHT, J., said (ibid.):

> "It may well be that the provision authorising the making of a byelaw directing that an instrument shall be carried has the effect of authorising a byelaw directing that such instrument shall be used. It is unnecessary, however, for the purposes of our decision, to say more than that the first part of the byelaw is valid."

H The court therefore left the question open whether the local authority could properly impose the duty of re-weighing upon the carman, but if a byelaw is necessary for that purpose it seems to me to follow pretty clearly that the section does not impose the duty. In my opinion the section does not impose that duty. I agree, therefore, that the conviction was wrong and must be quashed.

I **LOW, J.**—In the absence of any provision in the statute to show that there is a liability on the part of the carman to do the act which the present appellant refused to do, it would be a mere abuse of language to call what happened in this case "obstruction." I agree that the conviction should be quashed.

Appeal allowed.

Solicitors: *Geoffrey B. Gush*; *E. Tanner.*

[*Reprinted by* W. W. ORR, ESQ., *Barrister-at-Law.*]

PAPWORTH *v.* BATTERSEA BOROUGH COUNCIL

[COURT OF APPEAL (Pickford, and Bankes, L.JJ., and Neville, J.), December 3, 6, 1915]

[Reported [1916] 1 K.B. 583; 85 L.J.K.B. 746; 114 L.T. 340; 80 J.P. 177; 60 Sol. Jo. 120; 14 L.G.R. 236]

Highway—Negligence—Construction by highway authority in accordance with universal practice—Gully and grating in highway—Undue depression below level of road—Accident to cyclist—Negligence negatived by jury—Liability of authority.

When making up a road in their district in 1883, a local authority constructed a gully with a grating on top in accordance with the universal method of construction at the time. When cycling along the road in 1912, a cyclist skidded on the grating, fell, and was injured. In an action for damages brought by the cyclist against the local authority, the jury made no finding of negligence, but found that the accident was due to the excessive depression of the grating in the road as originally constructed and that the local authority could not with reasonable care have known of the defect at the time of the accident.

Held: in the absence of any finding of negligence, the local authority must be presumed to have exercised reasonable care and skill in constructing the gully and grating, even if the best opinion at the time produced something which was found to be dangerous, and they were, therefore, not liable.

McClelland v. *Manchester Corpn.* (1), [1912] 1 K.B. 118, applied.

Notes. Referred to: *Nash* v. *Rochford Rural Council*, [1916–17] All E.R.Rep. 299; *Skilton* v. *Epsom and Ewell Urban Council*, [1936] 2 All E.R. 50.

As to negligence in the making up of a highway, see 19 HALSBURY'S LAWS (3rd Edn.) 312; and for cases see 26 DIGEST (Repl.) 533 et seq.

Cases referred to:

(1) *McClelland* v. *Manchester Corpn.*, [1912] 1 K.B. 118; 81 L.J.K.B. 98; 105 L.T. 707; 76 J.P. 21; 28 T.L.R. 21; 9 L.G.R. 1209; 26 Digest (Repl.) 428, *1313.*

(2) *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, H.L.; 38 Digest (Repl.) 16, *64.*

Also referred to in argument:

Shoreditch Corpn. v. *Bull* (1904), 90 L.T. 210; 68 J.P. 415; 20 T.L.R. 254; 2 L.G.R. 756, H.L.; 26 Digest (Repl.) 531, *2075.*

Blackmore v. *Mile End Old Town Vestry* (1882), 9 Q.B.D. 451; 51 L.J.Q.B. 496; 46 L.T. 869; 47 J.P. 52; 30 W.R. 740, C.A.; 26 Digest (Repl.) 419, *1286.*

White v. *Hindley Local Board* (1875), L.R. 10 Q.B. 219; 44 L.J.Q.B. 114; 32 L.T. 460; 23 W.R. 651; sub nom. *White* v. *Wigan Local Board*, 39 J.P. 533, D.C.; 26 Digest (Repl.) 532, *2077.*

A.-G. v. *Theobald* (1890), 24 Q.B.D. 557; 62 L.T. 768; 38 W.R. 527; 42 Digest 706, *1237.*

Nevill v. *Fine Art and General Insurance Co.*, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 72, *1010.*

Seaton v. *Burnand*, *Burnand* v. *Seaton*, [1900] A.C. 135; 69 L.J.Q.B. 409; 82 L.T. 205; 16 T.L.R. 232; 44 Sol. Jo. 276; 5 Com. Cas. 198, H.L.; 26 Digest (Repl.) 221, *1707.*

Newberry v. *Bristol Tramways and Carriage Co., Ltd.* (1912), 107 L.T. 801; 29 T.L.R. 177; 57 Sol. Jo. 172; 11 L.G.R. 69, C.A.; 8 Digest (Repl.) 76, *508.*

Sharpness New Docks and Gloucester and Birmingham Navigation Co. v. *A.-G.*, ante, p. 355; [1915] A.C. 654; 84 L.J.K.B. 907; 112 L.T. 826; 79 J.P. 305; 31 T.L.R. 254; 59 Sol. Jo. 381; 13 L.G.R. 563, H.L.; 26 Digest (Repl.) 647, *2925.*

Lambert v. *Lowestoft Corpn.*, [1901] 1 K.B. 590; 70 L.J.K.B. 333; 84 L.T. 237; 65 J.P. 326; 49 W.R. 316; 17 T.L.R. 273; 45 Sol. Jo. 295; 26 Digest (Repl.) 531, *2071*.

Saunders v. *Holborn District Board of Works*, [1895] 1 Q.B. 64; 64 L.J.Q.B. 101; 71 L.T. 519; 59 J.P. 453; 43 W.R. 26; 11 T.L.R. 5; 39 Sol. Jo. 11; 15 R. 25, D.C.; 26 Digest (Repl.) 532, *2080*.

Maguire v. *Liverpool Corpn.*, [1905] 1 K.B. 767; 74 L.J.K.B. 369; 92 L.T. 374; 69 J.P. 153; 53 W.R. 449; 21 T.L.R. 278; 49 Sol. Jo. 296; 3 L.G.R. 485, C.A.; 26 Digest (Repl.) 420, *1294*.

Short v. *Hammersmith Corpn.* (1910), 104 L.T. 70; 75 J.P. 82; 9 L.G.R. 204, D.C.; 26 Digest (Repl.) 420, *1296*.

Appeal by the plaintiff against an order of SCRUTTON, J., 84 L.J.K.B. 1881, dismissing an action for damages for personal injuries.

The plaintiff's injuries were sustained on June 26, 1912, through falling off her bicycle under a victoria owing, as she alleged, to the defective condition of a gully in Lombard Road in the borough of Battersea. The gully and its grating had been constructed in connection with a sewer in 1883 by Wandsworth District Board of Works, in whose area Lombard Road then was.

By s. 68 of the Metropolis Management Act, 1855, all sewers situate in any parish mentioned in Sch. A to the Act, with the gullies, grates, works, and things thereunto appertaining, and the materials thereof, became vested in the vestry of such parish, and all sewers situate within any district mentioned in Sch. B to the Act, with all such works and things appertaining thereto, became vested in the board of works for such district. Schedule B, Part 1, to the Act included the Wandsworth district, and, as one of its parishes, the parish of St. Mary, Battersea (excluding Penge). By s. 69 the vestries and district boards were bound to repair and maintain all sewers vested in them. By s. 96 the powers and duties of surveyors of highways were vested in the vestries and district boards.

By s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, the parish of St. Mary, Battersea (excluding Penge), ceased to form part of the Wandsworth district, and

> "the principal Act shall be read and have effect as if the said parish, excluding Penge, had been named in Part II of Sched. A of the said Act, and the vestry of the said parish shall become and be a body corporate by the name of the Vestry of the Parish of St. Mary, Battersea."

By s. 4 of the London Government Act, 1899, the powers and duties, property and liabilities of the vestry of St. Mary, Battersea, were transferred to the defendant council.

At the first trial, before HORRIDGE, J., and a common jury, reported [1914] 2 K.B. 89, the jury awarded the plaintiff £1,961, and on further consideration the learned judge held that s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, did not transfer to the parish of St. Mary, Battersea, any existing liability of Wandsworth District Board of Works as highway authority in respect of the defective gully, and therefore that no liability in connection with it was transferred to the defendants by s. 4 of the London Government Act, 1899, but that the defendants were liable as sewer authority for not repairing the defect in the gully. The learned judge accordingly entered judgment for the plaintiff. The Court of Appeal set that judgment aside and ordered a new trial on the grounds inter alia that there had been no proper finding at the trial whether the gully was in the possession of the defendants as road authority or sewer authority, nor whether the defendants had knowledge or ought to have known of the defect ([1915] 1 K.B. 392).

At the second trial before SCRUTTON, J., the judge left certain questions to the jury, which, with their answers thereto, were as follows:

(i) At the time of the accident was a piece of the frame of the grating missing? —Yes. (ii) Was the grating at the time of the accident dangerous to a careful

cyclist; if so, in what respect?—No, not the grating itself. (iii) Was the danger due to the original construction; if so, what was the defect?—Yes, excessive depression. (iv) Or to some subsequent alteration of position; if so, what caused it?—No. (v) and (vi) Was the plaintiff's injury caused (a) by the broken frame; or (b) by the dangerous condition of the grating?—No, not specifically. (vii) Could the plaintiff have avoided her injury by the exercise of reasonable care and skill?—No; considering the presence of the victoria and the state of, and depression in, the road. (viii) Was the grating part of the road or part of the sewer?—Part of the road. (ix) Who placed the grating in the road?—The Board of Works for the Wandsworth District. (x) Who paid for it?—The frontagers. (xi) Who controlled and maintained it—the road authority or the sewer authority?—The road authority. (xii) Did the road authority or the sewer authority by their servants, at the time of the accident, know, or could they by the exercise of reasonable care have known, of the defect, if any, in the grating or frame, and remedied it?—No. (xiii) What damages has the plaintiff suffered from the accident?—£740 doctor, £15 additional. In answer to the supplementary questions, the jury found that the grating and frame in the original depression were dangerous. With regard to the answer to questions (v) and (vi) they said that the accident was caused by the broken frame and grating in the excessive depression.

On these findings SCRUTTON, J., gave judgment for the defendants and the plaintiff appealed.

F. A. Greer, K.C., and *Sidney Lamb* (*Cecil Fitch* with them) for the plaintiff.
Lewis Thomas, K.C., and *Walter Warren* for the defendants.

PICKFORD, L.J.—The plaintiff appeals against the judgment of SCRUTTON, J., after a trial before him and a special jury. The case is a difficult one, and it is made more difficult by some confusion in the answers given by the jury. The facts, so far as it is necessary to state them for the purposes of the case, are these: the plaintiff was riding a bicycle along a street in the borough of Battersea. There was somewhere near a horse-drawn vehicle—I think a brougham or victoria—to avoid which the plaintiff appears to have inclined her bicycle towards the side of the road. At the side of the road there was a grid covering a gully which was made for the purpose of draining the surface water from the road down into the sewer. Over the gully there was a grating. The plaintiff's bicycle, we must take it, according to the answers of the jury, slipped, skidded, or side-slipped on this grating. She came down and suffered very considerable injuries from being run over by the carriage she was trying to avoid. She alleged that the cause of those injuries was the negligence of the defendants, or of some other public body whose liability was transferred to them, in having an improper and dangerous grating in the highway. She alleged that two things were wrong; first, she said that there was a piece broken out of the grating which made the wheel of a bicycle likely to catch in it, and, secondly, she said that the grating (which was a curved grating, as these gratings so often are if they are at the sides of roads) was at an excessive distance below the surface of the road. The case which was really set up at the trial as to the depression was that the grating had sunk in consequence of improper construction in a manner which I need not detail, and had gone down considerably from the position in which it had originally been placed. That was negatived by the jury, and we need not trouble about that.

The findings of the jury are rather odd, but I think they found in effect that the grating and the frame had been put in such a position as to be too low in relation to the adjoining surface of the road, and that that was occasioned not only by the curve of the grating itself, but by the surface being brought at an incline on each side down to the frame and to the edge of the grating. It was said that it was "dished," and the word "dishing," as used certainly by most of the witnesses, and I think practically by all, with the possible exception of the witness Mr. Foster, referred not only to the curve of the grating but also to the

curve of the adjoining setts—I think they were setts at that time—down to the edge of the grating, which was done for the purpose of allowing the water to run down and allowing débris to get away. The jury found these findings [HIS LORDSHIP read the questions left to the jury and their answers and said:] I take the answer to question (ii) to mean that no danger was occasioned to a careful cyclist from the piece being missing from the grating. The answer to question (iv) is the finding to which I alluded when I said that the jury disposed of the question of subsidence in consequence of the grating being improperly constructed—I mean subsidence after it was put there—and they therefore found that the danger was due to the excessive depression in original construction. Some of these findings are rather difficult to reconcile one with the other, and some of them a little difficult to understand, but I think the effect of them is this, that the accident was caused by the condition of the grating and the depression in the road—i.e., the depression of the grating below the surface of the road—that that depression was extreme, that that was a part of the original construction, and that the defendants were not negligent and not liable for any negligence in not having discovered that that extreme depression was dangerous. The findings about the road and the sewer authority were, of course, for the purpose of determining whether it was misfeasance or non-feasance, and whether the sewer authority were the persons responsible for it. The jury have also found that the grating and adjoining parts of the road were constructed by Wandsworth District Board in 1883. They have found that it was dangerous, but they have not in terms found that there was anything negligent in Wandsworth District Board in constructing it in that way.

It remains to be seen whether there is any implied finding of negligence. I think an implied finding of negligence is a dangerous thing and, if negligence is to be relied on as a foundation for an action, I think it should be expressly and specifically found. The contention before us is that when the jury found that there was danger due to the original construction in the excessive depression of the grating they must have found that it was negligent, because they could not have found that it was so put as to be dangerous without its being negligent on the part of those who put it there. That, as a general proposition, on such a finding may perhaps have something to support it, but to see whether it is well-founded in any particular case one must look at what was before the jury in that case. The evidence was substantially uncontradicted—I say substantially because there may perhaps be some very small amount of evidence on the part of the plaintiff to the contrary, though I rather doubt it; it was substantially unanimous—that this method of construction, both of the grating and of the frame of the grating, and the parts of the road adjoining the frame and the grating, was the universal method of construction at the time when this was done. There are now, it was said, thousands—hundreds, at any rate—of such gratings, and so placed, within this very borough, and there are probably thousands in the London district. The jury have found that this was in fact dangerous, but looking at the evidence which they had in regard to the state of things and the state of knowledge and the state of professional skill at the time when it was done, I do not think that it can be implied from their finding that they intended to find that it was a negligent thing to do. It is possible that experience may have shown a thing to be a danger, and yet there may not have been any negligence; the best skill and information available at the time may have been employed in putting it down. Therefore I do not think that the jury can be taken to have implied a finding of negligence by them. There certainly is, as I have said, no specific finding.

If there be no finding of negligence, we have to look at it, I think, from this point of view. Wandsworth District Board, exercising proper and reasonable skill and care, when they were making up this road thirty years ago, put down a grating in a way which the jury have found to be, in the circumstances of this case, dangerous. Are they responsible for that? As I have said, if that be the

proper way of looking at it, they have done it without negligence. In my opinion they are not responsible for it, and for this reason—they did it under the provisions of the Metropolis Management Act, 1855, which in s. 105 provides: [His Lordship read the section and said:] Acting under the powers of that section, Wandsworth District Board made up this road and adopted it, and in doing so they put in this grating in the way in which it was put in. I cannot say, perhaps, that they were fulfilling a statutory obligation, because that particular section only empowers them to pave, and does not oblige them to do so. The question is, what was their duty? I think their duty when they exercised their statutory powers was very properly laid down by Lush, J., in dealing with a public authority which was exercising similar powers in *McClelland* v. *Manchester Corpn.* (1). Dealing here with the question of misfeasance and non-feasance, he says ([1912] 1 K.B. at pp. 129, 131):

> "It is no doubt true that when a road is dedicated as a highway the public, or the road authority, if they accept it, take it as it is with all its defects. But if a road authority undertake a duty with regard to it, and make it up, and open it to the public as a made up street, they must, in my opinion, exercise due care and have due regard to the safety of those who will use it. It is, I think, clear law that when a local authority undertakes and performs a duty, whether they are bound by statute to do so or whether they have an option to perform it or leave it unperformed, however it arises, they are bound to exercise proper and reasonable care in its performance, and that there is no difference in this respect between a public body and a private individual who does an act which, if carelessly done, may cause injury to others. . . . They had general powers, permissive, not imperative, to make up any street within their district in the way they thought fit, and they were bound, as it seemed to me, to act reasonably in the exercise of those powers."

That seems to me to be an accurate statement of the duty laid on a local authority which is fulfilling its statutory powers in the way in which Wandsworth District Board was doing. I do not think that it imposes a higher duty. I do not think a duty is imposed on them of absolutely making the road perfectly safe. If they do something which turns out to be dangerous, but do that without any absence of reasonable care and skill, then, in my opinion, they are not responsible; and, as far as I can see, that is what took place in this case. In the course of making up this road, in order to drain it and prevent surface-water settling on it, they had to make an escape for the surface-water into the adjacent sewer. When they had done that, which they did by making a hole in the road and a gully for the water to pass through, they had to make the road safe for persons who were travelling along it by putting a covering over the hole they had made; and, if they exercised reasonable care and skill, and did the work according to the best opinion prevailing at the time when they did it, then, in my opinion, they were not responsible for its in fact turning out to be dangerous a good many years afterwards. Of course, if the state of things had been such that as time went on it became obvious to persons like the local authority or their surveyor or other surveyors that this grating so placed was dangerous, and if they or their successors allowed it to remain so, then they or their successors might be responsible because, although they were not negligent in the original construction, they might be said to be negligent in not having altered it when it became clear that it was dangerous; but any such case as that has been negatived by the jury, because Battersea Corporation, or their predecessors, Battersea Vestry, have had possession and control of this thing for nearly thirty years, and the jury have found that there was nothing negligent in their not having found out that this particular grating was dangerous. As I say, it may be a little difficult to reconcile all the findings of the jury. I do not know, and it is perhaps dangerous to speculate, but I think probably what they meant by that was that, although it was possible for them by an inspection to see, and although they probably did see, the actual state of

things which was existing, there was nothing to call their attention to the fact that it was dangerous. But, on the other hand, there is the finding, and therefore it remains, as I have said, a construction done by Wandsworth District Board without negligence, but in fact, in the opinion of the jury, turning out to be dangerous. That does not impose, in my opinion, any liability on Wandsworth District Board. That really is sufficient to dispose of the case. The nice and difficult questions of whether this was part of the road or part of the sewer, whether it was under the control of the local authority as a road authority or as a sewer authority, and whether what happened may be properly called misfeasance or non-feasance, become immaterial if that is the correct view of the case, and therefore I do not think it necessary to discuss them.

Another nice and difficult question has been discussed before us, which was this: Wandsworth District Board was the creation, I think, of the statute to which I have referred of 1855. In 1887 Battersea, or Battersea including Penge, was taken out of the district of Wandsworth District Board, and handed over to the Vestry of Battersea. In 1899 the powers and liabilities of the Vestry of Battersea were transferred to the present defendants, Battersea Corporation, and nice and somewhat difficult questions were raised as to whether the effect of that legislation was or was not to transfer any liability which there might be upon Wandsworth District Board to the Vestry of Battersea, and from them to the present defendants. As I take the view that Wandsworth District Board were not liable—that no liability was imposed on them—it is not necessary to inquire whether that liability was transferred. It is a very difficult question, and I do not think it necessary to express any opinion on it, and therefore I shall not do so.

In my opinion the appeal fails on the ground that I have stated, that there was no evidence of negligence on the part of Wandsworth District Board, and without negligence they are not responsible for exercising the statutory powers that they were exercising when they put this grating and gully into the road in the way they did. In my opinion the appeal fails and must be dismissed.

BANKES, L.J.—I agree. The plaintiff in this unfortunate litigation seems to have made a twofold case against the defendants. She alleged that the condition of this gully or grating was defective in two respects, first because a portion of the grating itself or the setting in which it was placed was broken, and, secondly, because owing to defective construction the surface of the grating had sunk; and it was also alleged that the defendants were responsible for that condition of things because they were the sewer authority for the district, and their responsibility in respect of this gully or grating was the responsibility of the sewer authority, and as such it was not open to them to raise this question about non-feasance or misfeasance. But they had a second string to their bow in alleging that, whether they were right or wrong in that first condition, this gully or grating had been originally wrongly or improperly constructed, that the liability for that original construction passed to Battersea Vestry under the statute, and that that was a misfeasance for which Battersea Vestry, even if their responsibility in respect of this gully or grating was that of a highway authority, would be liable. On the other hand, the defendants said: "We have nothing to do with the grating or gully as sewer authority, and there is in fact really nothing wrong with this grating; it was constructed many years ago by Wandsworth District Board, and they put it in in accordance with the best engineering opinion of the time, and nothing now really can be said against this construction in any shape or form. There has been no sinking, and we are not liable."

In those circumstances several questions were put to the jury, and, as often happens in such cases, although the jury may have a very clear idea of what they intend and desire to say, when they come to split it up amongst the answers to a number of questions they do not make their meaning very clear. It is very easy to criticise the answers that were given and to say they were not, on the face of them, at all clear; I do not think they are, but I agree with what

SCRUTTON, J., said with regard to the meaning of the findings when he says (84 L.J.K.B. at p. 1884) that the jury

> "find that the frame of the grid was broken and part of it was missing; but I think the effect of their twelfth finding is that that broken part was so full of detritus that it was not negligent not to have discovered that it was broken; and they find that what caused the accident was that in the original construction of the channelling, gully and the grating, the surface level of the grating was placed so much lower than the surrounding road that it was in fact a danger; but as I read it they also find that, though it was a danger, it was not negligence not to have seen that it was a danger, which I think must mean that they thought it was the ordinary method of construction at the time it was made."

It seems to me, on reading these answers, that that is clearly what the jury did intend to convey. They did not really accept the case either of the plaintiff or of the defendants, but they took their own line with regard to it, and they found that this gully or grating in its original construction was a danger, having regard to the fact that this accident had happened, but that, owing to the state of engineering knowledge and practice with regard to this gully at the time it was put in, there was no ground for suggesting that either the persons who originally put it in or the persons in whose charge it had been subsequently were negligent in not having discovered or noticed that there was any defect in it.

In those circumstances, what is the position of the plaintiff? The plaintiff appeals here, but she does not ask that any further questions should be submitted to the jury and does not complain that any question was not submitted to the jury which ought to have been; and she is content to rest her case on the findings as they stand. It seems to me that this case falls within the principle of *Geddis* v. *Proprietors of Bann Reservoir* (2), and that is in accordance with the view taken by LUSH, J., in *McClelland* v. *Manchester Corpn.* (1), which has been referred to by PICKFORD, L.J. In *Geddis* v. *Proprietors of Bann Reservoir* (2) LORD BLACKBURN said (3 App. Cas. at pp. 455, 456):

> "It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers."

If that is the law applicable to this case, as I believe it is, it is incumbent on the plaintiff to establish that there was negligence on the part of the Wandsworth District Board in the original construction of this gully or grating. There is no such finding, and, on the contrary, if SCRUTTON, J.'s view of what the jury meant is accepted, the jury negatived that. In those circumstances, in my opinion, the appeal fails.

But there is this other point on the statute which has been already before two learned judges; and I must say that I think the case of the respondents is right on that point also. Section 4 of the Act of 1887, on which this question arises, provides not that the Vestry of St. Mary, Battersea, shall, in the Act of 1855, be substituted for Wandsworth District Board, and that that Act has to be read as though wherever the words "Wandsworth District Board" appear "the Vestry of Battersea" is to be substituted; but it provides that:

> "The parish of St. Mary, Battersea, excluding Penge, shall cease to be united with the parishes mentioned in Sch. B of the principal Act as forming the Wandsworth District, and the principal Act shall be read and have effect as if the said parish, excluding Penge, had been named in Part 2 of Sch. A of the said Act."

If it had been named—and, of course, that means originally named—then the effect would have been that the vestry of the parish of St. Mary, Battersea, would have had the right to do the work to this road which was in fact done by Wandsworth District Board; but the fact that the statute gave them the right to do it does not seem to me to impose an obligation on or to pass over a liability to them, if in fact they had not done it, but Wandsworth District Board had in fact done it; and, so far as I can see, there are no words which pass the liability of Wandsworth District Board for what they had done to Battersea Vestry, who had not done or attempted to do the work, although in consequence of the provisions of s. 4 of the Act of 1887 the Act of 1855 must be read as though they had the powers. In my opinion, on both grounds the appeal fails.

NEVILLE, J.—I think that the whole question really turns on how we are to understand the findings of the jury. I agree that, even though when the gully was constructed in 1883 it was so constructed that many years afterwards it proved to be a danger to passengers, still that would not be such misfeasance as to make the road authority liable unless they had failed in reasonable care in the original construction of the gully; and after all the consideration that I can give to the findings of the jury, I agree with the Lords Justices that there is no finding by the jury of any such want of reasonable care. That, of course, determines the case. I do not wish it to be understood that if Wandsworth District Board had been guilty of negligence in the construction of the gully the defendants in the present case would not have been liable, because I am not satisfied that the whole of their liabilities were not, by force of the words of the statute of 1899, transferred to the present defendants. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. W. Young, Son, & Ward*; *Paul Caudwell.*

[*Reported by* EDWARD J. CHAPLIN, ESQ., *Barrister-at-Law.*]

McVITTIE *v.* TURNER

[COURT OF APPEAL (Swinfen Eady, Phillimore and Bankes, L.JJ.), July 29, 1915]

[Reported 85 L.J.K.B. 23; 113 L.T. 982; 80 J.P. 25; 60 Sol. Jo. 238; 13 L.G.R. 1181]

Cinematograph—Entry on premises—Constable—Need of special appointment by county council—Validity of entry—Trespass—Entry to see whether provisions of Cinematograph Act, 1909, *complied with—Further purpose to check compliance with other statutory provisions—Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 4.

A constable entering premises to see whether the provisions of the Cinematograph Act, 1909, have been complied with need not be specially "appointed for the purpose by [the] county council," those words in s. 4 of the Act applying only to an officer appointed by the council and not to a constable.

If a constable, following the instructions of his superior officer, enters premises to see whether the provisions of the Act have been complied with, e.g., those relating to the use of inflammable films, his entry will not constitute a trespass because he is instructed also to look for other matters, e.g., the provision of music without a licence, even though those other matters are more important in the mind of the person who sent him.

Notes. As to entry by a constable on premises under the Cinematograph Act, 1909, s. 4, see 32 HALSBURY'S LAWS (2nd Edn.) 74. For the Cinematograph Act, 1909, s. 4, see 25 HALSBURY'S STATUTES (2nd Edn.) 42.

Case referred to in argument:

Alty v. *Farrell*, [1896] 1 Q.B. 636; 65 L.J.M.C. 115; 74 L.T. 492; 60 J.P. 373; 12 T.L.R. 346; 40 Sol. Jo. 460; 18 Cox, C.C. 321, D.C.; 44 Digest 141, *87.*

Appeal by the defendant against a judgment of SANKEY, J., sitting with a jury at Manchester Assizes.

The plaintiff, who was the proprietor of premises not licensed for cinematograph performances, sued the defendant, who was chief constable of Oldham, for trespassing by his inspector and constables on the plaintiff's premises against the plaintiff's will. SANKEY, J., left two questions to the jury: (i) Had the defendant reason to believe that inflammable films were being used or about to be used at the plaintiff's theatre? (ii) Were the police officers sent for the bona fide purpose of finding out what sort of films were being used or about to be used, and finding out whether the provisions of the Act were being complied with? The jury answered both questions in the negative, and assessed the damages against the defendant at £100. The defendant appealed.

Gordon Hewart, *K.C.*, and *Oliver* for the defendant.
Ernest Wild, *K.C.*, and *A. L. Bridge* for the plaintiff.

SWINFEN EADY, L.J.—The appeal is by the defendant David Henry Turner, who is the chief constable of Oldham, asking us to set aside the verdict and judgment, and to have a new trial, on two grounds: first, that the verdict was against the weight of the evidence, and secondly, that the trial was unsatisfactory, and that the summing-up, especially on the second point submitted to the jury, did not give the jury that assistance which they ought to have had, and so rendered the trial unsatisfactory.

The proprietor of a picture palace or cinematograph show at Oldham is plaintiff, and he claims damages for trespass by the defendant on the plaintiff's premises by attending the cinematograph by his constables and an inspector, and claiming a right to be there, and entering against the will of the plaintiff. On several occasions the constables have paid for admittance; and no complaint is made as to those entries. But it is conceded that what has taken place would be a trespass which the defendant has to justify, and that the defendant must fail unless he can justify his acts in claiming to enter the theatre as of right. There has been no leave and licence, and no invitation by the plaintiff to the defendant to enter the theatre. The defendant accepts that position, and has dealt with it on that footing.

The plaintiff claims under the Cinematograph Act, 1909, s. 1 of which provides:

> "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or save as otherwise expressly provided by this Act elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

So that inflammable films cannot be used (i) except in premises licensed for the purpose, and (ii) unless certain regulations made by the Secretary of State have been complied with. The plaintiff's premises have not been licensed for the purpose in accordance with the provisions of the Act, so they are unlicensed premises; therefore no exhibition for which inflammable films are used can be given in those premises. It is not a question of whether the regulations made by the Secretary of State are complied with; whether they are or not is immaterial for this purpose, because the premises are not licensed, and unless they are licensed, whatever the

A conditions and regulations with regard to safety may be that are observed, the films cannot be exhibited there.

Section 4 under which the defendant justified entry as a police officer provides:

> "A constable or any officer appointed for the purpose by a county council may at all reasonable times enter any premises, whether licensed or not, in which he has reason to believe that such an exhibition as aforesaid is being or is about to be given, with a view to seeing whether the provisions of this Act, or any regulations made thereunder, and the conditions of any licence granted under this Act, have been complied with. . . ."

That is the power of entry, and it is subject to two limitations. One is that the constable must have reason to believe that such an exhibition is being, or is about to be, given. Unless he has reason to believe that, he is not entitled to enter, for mere suspicion does not give him a right of entry. The second point is that the entry must be made with a view of seeing whether the provisions of the Act have been complied with. That must be the object of the visit. It was urged here that according to the true construction of this section the constable must be specially appointed for the purpose by a county council. But I do not read the section in that way. In my opinion the true construction of the section is this: A constable may at all reasonable times enter, or any officer appointed for the purpose by a county council may at all reasonable times enter, and he need not be appointed for the purpose by a county council. If that had been intended the section would probably have run: "A constable or other officer appointed for the purpose," but it runs: "A constable or any officer."

[HIS LORDSHIP reviewed the evidence and held that the verdict of the jury on the first question left to them that the defendant did not have reason to believe that inflammable films were being used or were about to be used at the plaintiff's premises was one which no reasonable men could have properly given, and continued:] The second question that the learned judge left was:

> "Were the police officers sent for the bona fide purpose of finding out what sort of films were being, or were about to be used, and finding out whether the provisions of the Act were being complied with?"

The jury answered in the negative as they had answered the first question. In my opinion the summing up on this question being left to the jury was not satisfactory. The case of the plaintiff is that it was complained that he, a much persecuted man, had music at this cinematograph theatre, the premises not being licensed premises, and that the real purpose for which the police were sent was not to obtain evidence, or to make inquiries, or with a view to seeing whether the provisions of the Act with regard to films were being observed, but to see whether music was being given at the entertainment contrary to the provisions of the statute. [HIS LORDSHIP referred to previous visits to the premises and prosecutions for providing music there, and continued:] It is urged that in May visits were made by at least two constables with a view to obtaining further evidence to justify convictions on the music question. It is said that the only right of entry was with a view to seeing whether the provisions of the Cinematograph Act were being complied with, and that the defendant had no right to send the police there with regard to the music question. [HIS LORDSHIP referred to confusion in the summing up with regard to seeing if the regulations were being complied with, although they did not apply because the premises were not licensed premises, and continued:] But the object of the police inspecting here was to see whether inflammable films were used, and that involved making inquiries that Inspector Longson gave evidence of having made.

I think that in the summing-up the learned judge has not left clearly to the jury the position on this part of the case. In my opinion, it would be sufficient if the police officer were sent for the bona fide purpose of finding out what sort of films were being used, or about to be used. That would be a sufficient compliance

with the statute, and would be a justification for their entry, even though, at the same time, they had been told to keep their eyes and ears open to any other matters that might arise with regard to music or anything else; but, if they were sent for the bona fide purpose of dealing with the films, it would not render their presence invalid, illegal, or unauthorised if they had also instructions to observe anything else that was going on at the same time.

For these reasons, on both grounds, I think the trial was unsatisfactory. On the first point it cannot be allowed to stand, nor, on the second point, owing to the way it was summed up by the judge; and therefore the verdict of the jury must be set aside, and there must be a new trial.

PHILLIMORE, L.J.—I am of the same opinion. The first point one has to address oneself to is the construction of s. 4 of the Cinematograph Act, 1909, and I agree with what I understand is the view taken by the learned judge, and has been expressed by SWINFEN EADY, L.J., that under s. 4 either a constable or any other officer appointed for that purpose by the council has the power which that section gives. In county boroughs, and only in county boroughs, the constable is to be appointed by the county borough council, and even then not directly by the watch committee. In the county of London the police are not appointed by the county council, either in London or outside the City, and in all counties it is the standing joint committee of the county council, and the magistrates, who exercise police jurisdiction. Therefore, there would be two classes of authorities; it may well be that the county council in a particular place desire to have their own officers appointed for this purpose, and it is probably for that reason that the two classes of authorities are mentioned in the section. But having got as far as that one has to consider whether the defendant, who has to justify some of these trespasses complained of, brings himself within s. 4. I say "some of them," because it might well be material on s. 5 to consider whether there was any trespass at all; i.e., some of the earlier visits. I agree that, in order to justify, the defendant has to show two things: he has to show that he has reason to believe that there is such a cause as the Act mentions, and, if he goes in, or sends a man in, to see whether the provisions of the Act have been complied with, he must, no doubt, support both those contentions, and therefore it was right to put two questions.

[HIS LORDSHIP held that the verdict of the jury on the first question was such as no reasonable men could give and was perverse and should be set aside, criticised the judge's summing-up on the second question as not giving the jury sufficient assistance, and continued:] Secondly, I am sure I do not know what his own view was; I am sure if I had been the jury I should not have known what his own view was as to whether a constable should have been sent in for two purposes. To my mind, if he was sent in with a view of seeing whether any particular provision of the Act, such as not having inflammable films, was complied with or not, if he was sent in for that purpose, it does not matter whether he was told at the same time that he might look for half-a-dozen other purposes; nor does it matter if it was proved that in the mind of the person who sent him in some of the other purposes were more important than the purpose under which he had authority to go in. When authority is given to a man to do that which otherwise would be a trespass, if he pursues the authority and satisfied the conditions of the authority, all other inquiries are superfluous. As regards the form of the question, I think it is unfortunate that the words "bona fide" were introduced. They immediately lead the jury, which, obviously, would be sympathetic to the plaintiff, to think that there was a loophole with regard to their verdict. But, apart from that, there is the danger of the double sentence which leads the jury back to the old trouble between licensed and unlicensed houses; but worse than all that is the fact that they did not get sufficient assistance to enable them to understand what was the point which they had to determine. The point they had to determine was whether these people, for whatever other purposes they were also sent,

were sent with a view to seeing whether the provisions of the Act as to non-inflammable films had been complied with or not. I think for these reasons, which are substantially those that have been already indicated by SWINFEN EADY, L.J., that this verdict cannot stand, and there must be a new trial.

BANKES, L.J., held that the summary upon the first part of the case was not satisfactory and that there had been a clear misdirection on the second point, and concluded: On those grounds I agree there ought to be a new trial in this case.

Appeal allowed. New trial ordered.

Solicitors: *Johnson, Weatherall & Co.*, for *J. H. Hallsworth*, Oldham; *Hargrave, Son & Barrett*, for *March, Pearson & Akenhead*, Manchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* NOEL

[COURT OF CRIMINAL APPEAL (Ridley, Lord Coleridge and Scrutton, JJ.), July 8, 1914]

[Reported [1914] 3 K.B. 848; 84 L.J.K.B. 142; 112 L.T. 47; 24 Cox, C.C. 486; 10 Cr. App. Rep. 255]

Criminal Law—Evidence—"Act disclosed in consequence of compulsory process of any court"—Act first disclosed by witness while under cross-examination, without protest, in civil action—Larceny Act, 1861 (24 *& 25 Vict., c.* 96), *s.* 85.

A voluntary witness in a civil action who discloses while under cross-examination, without objection, that he has committed a misdemeanour under the Larceny Act, 1861, is not protected by s. 85 of that Act (which provides that no person may be convicted of any of the misdemeanours enumerated in the first ten sections of the Act by any evidence first disclosed by him in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been bona fide instituted by any party aggrieved), since such offence is not disclosed in consequence of any compulsory process of a court of law within the meaning of the section, and, therefore, he may be prosecuted for the offence so disclosed.

Notes. Applied: *R.* v. *Tuttle*, [1929] All E.R.Rep. 107. Distinguished: *R.* v. *Maywhort*, [1955] 2 All E.R. 752.

As to statements made by accused in other legal proceedings, see 10 HALSBURY'S LAWS (3rd Edn.) 477, 478; and for cases see 14 DIGEST (Repl.) 463 et seq. See also Larceny Act, 1916, s. 43 (2). For Larceny Acts, 1861 and 1916, see 5 HALSBURY'S STATUTES (2nd Edn.) 727, 1011.

Cases referred to in argument:

R. v. *Garbett* (1847), Car. & Kir. 474; 1 Den. 236; 9 L.T.O.S. 51; 13 J.P. 602; 2 Cox, C.C. 488, Ex. Ch.; 14 Digest (Repl.) 465, *4494*.

R. v. *Skeen and Freeman* (1859), Bell, C.C. 97; 28 L.J.M.C. 91; 23 J.P. 101; 5 Jur.N.S. 151; 7 W.R. 255; 8 Cox, C.C. 143, C.C.R.; 14 Digest (Repl.) 464, *4474*.

R. v. *Gunnell* (1886), 55 L.T. 786; 51 J.P. 279; 3 T.L.R. 209; 16 Cox, C.C. 154, C.C.A.; 14 Digest (Repl.) 507, *4922*.

R. v. *Oliver* (1909), 3 Cr. App. Rep. 246, C.C.A.; 14 Digest (Repl.) 465, *4490*.

Appeal from a conviction at the Central Criminal Court upon an indictment under s. 1 of the Larceny Act, 1901 [now s. 20 of the Larceny Act, 1916, 5 HALSBURY'S STATUTES (2nd Edn.) 1022].

The indictment contained several counts which charged the appellant with fraudulently converting to his own use a cheque for £1,000 and the proceeds thereof received for or on account of another person, or intrusted to him for a certain purpose, or intrusted to him for safe custody. The cheque for £1,000 was handed to the appellant by his employer. The appellant paid the cheque into a banking account on which he only could draw, and he drew out the full amount of the cheque. An action to recover the sum of £1,000 was brought in the High Court against the appellant and his employer. The appellant voluntarily gave evidence in the action, and while under cross-examination he was asked for the pass-book which had relation to the banking account. The pass-book was not in court, but on being told to fetch the book the appellant did so and produced it without any objection. The book was the first disclosure of the payment of the cheque for £1,000 into his banking account referred to, and of the drawing out of that sum by the appellant. A prosecution was thereupon instituted against the appellant.

At the trial part of the defence set up was that he could not be convicted because of the provisions of s. 85 (1) of the Larceny Act, 1861, the acts upon which the charge was founded having been first disclosed by him as already stated. This defence was held not good and the appellant was convicted. The appeal was based upon the defence set up at the trial.

Section 85 (1) of the Larceny Act, 1861, provides:

> "Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceedings in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceedings which shall have been bona fide instituted by any party aggrieved."

A. Powell, K.C., and *Arthur Lawton* for the appellant.
Travers Humphreys for the Crown.

RIDLEY, J., delivered the following judgment of the court. The contention raised on behalf of the appellant is that he was not liable to conviction because the acts which led to the charges against him had, previously to such charges, been first disclosed by him on oath in consequence of a "compulsory process" of the court within the meaning of s. 85 of the Larceny Act, 1861. It is urged that if a witness is cross-examined his answers are given in consequence of a compulsory process of the court, and that, therefore, no criminal proceedings can be put in force for the acts disclosed by such answers.

We think that the expression "compulsory process" in s. 85 means something more than merely putting to a witness a question which he may be unwilling to answer. If there were a compulsory examination as in bankruptcy or by interrogatories, or by a bill in equity, there would be a compulsory process of a court of law or equity. Again possibly, if a witness refuses to answer a question on the ground that his answer may incriminate him and he is ordered by the court to answer the question, that may be a "compulsory process" of the court within the meaning of s. 85. That point, however, does not arise in the present case, and we

do not wish to decide it. No privilege was claimed in this case, and we need only say that where a witness voluntarily gives evidence in proceedings in a court of law or equity such evidence is not given in "consequence of any compulsory process of a court of law or equity" within the meaning of s. 85.

Appeal dismissed.

Solicitors: *Adrian*, for *Henry & Co.*; *Director of Public Prosecutions.*

[*Reported by* R. F. BLAKISTON, ESQ., *Barrister-at-Law.*]

ROBSON *v.* PREMIER OIL AND PIPE LINE CO., LTD.

[COURT OF APPEAL (Lord Cozens-Hardy, M.R., Pickford and Warrington, L.JJ.), April 26, May 6, 1915]

[Reported [1915] 2 Ch. 124; 84 L.J.Ch. 629; 113 L.T. 523; 31 T.L.R. 420; 59 Sol. Jo. 475]

Alien—Enemy—Company—Enemy shareholder—Right to vote by proxy at company meeting.

All intercourse with enemy aliens whether commercial or not which tends to the detriment of Great Britain or advantage to her enemies inconsistent with a state of war between the two countries is forbidden on the ground of public policy.

During the 1914–18 war between Great Britain and Germany a British trading company which owned a large amount of property in Germany held a meeting of the company for the purpose of electing directors. The chairman of the meeting disallowed the proxies of a German bank, which had employed British subjects to exercise their voting power, on the ground that a shareholder who was an alien enemy could not during the war vote at a meeting of the company. Had the proxies been allowed directors other than those elected would have been elected and gained control and management of the company.

Held: the proposed exercise of the power of voting by the enemy shareholders was for the purpose of gaining control and management of a British trading company which owned large property in the enemy country; this was to the detriment of Great Britain and of advantage to the enemy; and, therefore, the rejection of the votes was justified.

Quære: whether intercourse with an alien enemy whether commercial or not which was not to the detriment of Great Britain would be prohibited.

Notes. The Trading with the Enemy Act, 1914, and the Trading with the Enemy Proclamation, 1914, No. 2, have been respectively repealed and revoked.

Considered: *Zinc Corpn.* v. *Hirsch*, post, p. 487; *Tingley* v. *Müller*, [1916–17] All E.R.Rep. 470; *Bevan* v. *Bevan*, [1955] 2 All E.R. 206. Referred to: *Jebara* v. *Ottoman Bank*, [1927] 2 K.B. 254; *Re Anglo-International Bank, Ltd.*, [1943] 2 All E.R. 88; *Boissevain* v. *Weil*, [1948] 1 All E.R. 893; *Arab Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1954] 2 All E.R. 226.

For cases on what constitutes trading with the enemy, see 2 DIGEST (Repl.) 258 et seq.

Cases referred to:

(1) *The Hoop* (1799), 1 Ch. Rob. 196; 2 Digest (Repl.) 276, *639.*

(2) *The Cosmopolite* (1801), 4 Ch. Rob. 8; 2 Digest (Repl.) 278, *653.*

(3) *The Panariellos* (1915), 84 L.J.P. 140; 112 L.T. 177; 31 T.L.R. 326; 59 Sol. Jo. 399; 13 Asp.M.L.C. 52; affirmed (1916), 85 L.J.P. 112; 114 L.T. 670; 32 T.L.R. 459; 60 Sol. Jo. 427; 13 Asp.M.L.C. 484, P.C.; 2 Digest (Repl.) 276, *640.* A

(4) *Kershaw* v. *Kelsey* (1868), 100 Mass. 561; 1 Amer. Rep. 142.

Also referred to in argument: B

Ex parte Boussmaker (1806), 13 Ves. 71; 33 E.R. 221; 2 Digest (Repl.) 243, *457.*

R. v. *L.C.C., Ex parte London and Provincial Electric Theatres, Ltd.*, [1915] 2 K.B. 466; 84 L.J.K.B. 1787; 113 L.T. 118; 79 J.P. 417; 31 T.L.R. 329; 59 Sol. Jo. 382; 13 L.G.R. 849, C.A.; 2 Digest (Repl.) 223, *341.*

Orenstein and Koppel v. *Egyptian Phosphate Co., Ltd.*, 1915 S.C. 55; 52 Sc.L.R. 54; [1914] 2 S.L.T. 293; 2 Digest (Repl.) 262, **413.* C

Grinswold v. *Waddington* (1819), 16 Johnson's Cases, 438.

Appeal from an order of SARGANT, J.

The plaintiff moved before SARGANT, J., on behalf of himself and all other the shareholders of the defendant company, which was an English company incorporated under the Companies (Consolidation) Act, 1908, except five shareholders, who were defendants, for an order that these five defendants and each of them might be restrained until the trial of the action or further order from acting or purporting to act as directors or a director of the defendant company, and that the company might be restrained from allowing its five co-defendants and each of them to act or purport to act as such directors or director as aforesaid. A meeting had been held for the election of directors of the company, and the chairman of the meeting, Sir Frank Crisp, had disallowed the proxies of Direction der Disconto-Gesellschaft, a German bank with its head office in Berlin and a branch in London, on the ground that a shareholder who was an alien enemy could not during the war vote at a meeting of the company. Had these proxies been allowed, directors other than the five defendants, who were in fact elected at the meeting, would have been elected. The business of the Direction der Disconto-Gesellschaft was being conducted in the United Kingdom under a licence to trade granted by the Secretary of State in pursuance of the power conferred on him by the Aliens Restriction (No. 2) Order in Council, 1914, made under the Aliens Restriction Act, 1914, Sir William Plender being appointed controller. The writ was issued in the action asking for (i) a declaration that none of the defendants, John Broad, Thomas Lennox Gilmour, Charles James Jackson, Scott Lings, and Arthur Whittaker, had been validly appointed directors or director of the company; (ii) an injunction until the trial of the action or further order restraining (a) the defendants and each of them from acting or purporting to act as directors or a director of the defendant company, and (b) the defendant company from allowing the defendants or any of them to act or to purport to act as such directors or director as aforesaid. On Mar. 31, SARGANT, J., held that the fact that the Trading with the Enemy Act, 1914, and the Trading with the Enemy Proclamation, 1914, No. 2, was silent as to the rights of alien enemies to vote at meetings of British companies did not relieve from any prohibition at common law; that at common law all intercourse with alien enemies was forbidden, whether commercial or not; and since the licence to trade given to the London branch of the German bank did not authorise the exercise of the voting power in question, the proxies had been rightly rejected by the chairman of the meeting. From that decision the plaintiff appealed. D E F G H I

Gore-Browne, K.C. (with him *Fairfax Luxmoore*), for the plaintiff.

Martelli, K.C., and *H. E. Wright* for the defendant company, and *G. M. Simmonds* for other defendants, were not called on to argue.

Cur. adv. vult.

May 6, 1915. **PICKFORD, L.J.,** read the following judgment of the court: The plaintiff, suing on behalf of himself and all other the shareholders in the

A defendant company except the five last-mentioned defendants, asked for a declaration that certain persons were not validly elected as directors of the defendant company. This involves the question whether a number of votes for which a proxy was tendered were rightly rejected. If they were, the directors were validly elected; if they were not and should have been counted, then other persons were elected as directors. The ground on which they were rejected was that they were
B tendered on behalf of an alien enemy—i.e, a German corporation, the Disconto-Gesellschaft—carrying on business in an enemy country, but having an establishment in London to which a licence has been granted in pursuance of the Aliens Restriction (No. 2) Order in Council of Aug. 10, 1914.

The case raises two questions, one of general importance and one of a subsidiary nature, namely, Have alien enemy shareholders a right of voting in respect of
C shares in a British company during the war, and of exercising that right by proxy; and, secondly, if there be not that general right, had these shareholders, by reason of the circumstances of this case, that right?

On the general question the argument of the appellants may, we think, be summarised in two contentions—(i) that the prohibition at common law of intercourse with an alien enemy is limited to commercial intercourse or trading; and (ii) that
D the transaction in this case did not come within the definition of commercial intercourse. In our opinion, neither of these contentions is correct. The prohibition of intercourse was stated as extending to much wider limits by LORD STOWELL in *The Hoop* (1), and *The Cosmopolite* (2), and reference was made in the judgment to writings of jurists on the subject. The statement there contained has
E been followed in several cases in the courts of this country, and also in America by such great authorities as STORY and KENT. It is not necessary, in our opinion, to examine these cases in detail, as they were very carefully considered quite recently by the President of the Probate, Divorce, and Admiralty Division in *The Panariellos* (3), and will be found collected in that judgment. We have not been referred to, and we do not know, of any case in this country in which any
F doubt has been thrown upon the statement of the law by LORD STOWELL, which is adopted by the learned President in the case mentioned. It was argued before us that these statements were all dicta not necessary for the decision of the cases in which they were made. Assuming this to be the case they are dicta of such high authority that we should hesitate to differ from them. But in our opinion, so far as they state that the prohibition extends beyond commercial intercourse, they
G are correct. We were, however, referred to *Kershaw* v. *Kelsey* (4), in which it was held, after a very careful examination of these cases and dicta, that they were not correct and that no intercourse was prohibited except commercial intercourse or trading with the enemy. This case has been followed in other cases in America. As we have already said, no such limitation is to be found suggested in any English case, and we cannot agree with it.

H The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country, or advantage to the enemy, is permissible, because it cannot be brought within the definition of a commercial transaction. Judge GRAY, in
I *Kershaw* v. *Kelsey* (4), states the law in our opinion correctly when he says that the law of nations as judicially declared prohibits all intercourse between citizens of two belligerents which is inconsistent with the state of war between their countries. But we respectfully disagree with him when he holds that nothing comes within that principle except commercial intercourse. We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to the country or advantage to the enemy. It is enough to say that, in our opinion, all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the lan-

guage of the learned judge before mentioned, inconsistent with the state of war between the two countries, and therefore forbidden.

That this transaction has such a tendency is clear. The proposed exercise of the votes is for the purpose of obtaining the control and management, or a large voice in them, of a British trading company which owns large property in the enemy's country, and that this may be to the detriment of the interests of this country and the advantage of the enemy cannot be doubted. We think also that the rejection of these votes may be justified on the narrower ground that this was a commercial transaction. Commercial intercourse is not confined to making contracts between an alien enemy and a British subject, and such a transaction as this directed to obtaining the control of a trading company is, in our opinion, commercial. It follows from what has been said that the employment of a British subject as proxy to exercise the voting power is an intercourse between him and the alien enemy which is prohibited. On the subsidiary point we do not think it is necessary to add anything to what has been said by SARGANT, J. Whatever may be the proper definition of a branch or transactions with a branch within the meaning of cl. 6 of the proclamation, we think it clear that this is not such a transaction with a branch. The licence does not authorise such a transaction, and it was not argued before us that it did. In our opinion the judgment of SARGANT, J., was quite right, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Mayo, Elder & Co.*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WILLESDEN URBAN DISTRICT COUNCIL *v.* MORGAN

[KING'S BENCH DIVISION (Ridley, Avory and Lush, JJ.), November 24, 25, 1914]

[Reported [1915] 1 K.B. 349; 84 L.J.K.B. 373; 112 L.T. 423; 79 J.P. 166; 31 T.L.R. 93; 59 Sol. Jo. 148; 13 L.G.R. 390; 24 Cox, C.C. 546]

Shop—Hours of closing—Early closing day—Shop closed—Automatic machine attached to door of shop for supply of goods—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 4 (1), 9.

By s. 4 (1) of the Shops Act, 1912 [now s. 1 (1) of the Shops Act, 1950]: "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one week-day in every week." By s. 9 of the Act [now s. 12 of the Shops Act, 1950]: "It shall not be lawful in any locality to carry on in any place, not being a shop, retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class, and, if any person carries on any trade or business in contravention of this section, this Act shall apply as if he were the occupier of a shop and the shop were being kept open in contravention of this Act."

The respondent, a dairyman, had fitted to the entrance door of his shop an automatic machine by means of which a supply of milk from a reservoir inside the shop was made available to the public on the insertion of a coin in the slot provided for that purpose in the machine when the shop was closed. On the afternoon of the day of the week appointed for the weekly half-holiday the respondent's shop was closed, but the machine was being used by members of the public who wished to buy milk.

Held: the words "for the serving of customers" in s. 4 (1) meant for the personal serving of customers; as the reservoir containing the milk was inside the shop there was no carrying on of the retail trade of dairyman at a place not being a shop, contrary to s. 9 of the Act; and, therefore, the respondent was not guilty of an offence against either of those sections.

Notes. The Shops Act, 1912, was repealed by the Shops Act, 1950, s. 1 (1) and s. 12 of which re-enacts s. 4 (1) and s. 9 of the Act of 1912.

As to shop hours, see 17 HALSBURY'S LAWS (3rd Edn.) 194 et seq.; and for cases see 24 DIGEST (Repl.) 1111 et seq.

Special Cases stated by Middlesex justices.

The appellants, the Willesden Urban District Council, through one of their inspectors appointed to carry out the provisions of the Shops Act, 1912, laid two informations against the respondent, Morgan, for that he the respondent, in contravention of s. 4 of the Shops Act, 1912, failed to close his shop on Feb. 26, 1914, on the weekly half-holiday, and also, in contravention of s. 9 of the same Act, carried on on the same date in a place not being a shop the retail trade or business of a dairyman by means of an automatic machine.

Upon the hearing of the informations it was proved or admitted that an order was duly made and confirmed, extending, as regards Willesden, the provisions of s. 4 of the Shops Act, 1912, so as to include the retail trade or business of a dairyman, which was otherwise exempt under sub-s. (6) of s. 4. The respondent carried on the retail trade or business of a dairyman at Willesden. On Feb. 26, 1914, the appellants' inspector noticed that the respondent had had an automatic machine fitted to the door at the entrance of his shop, by means of which a supply of milk was afforded to the public in quantities of one half-pint on the insertion of a penny in the slot provided for that purpose and forming part of the machine. On the afternoon of Feb. 26, 1914, being the time when the respondent's shop was required to be closed for the usual weekly half-holiday, the inspector inserted a penny in the slot and, after complying with all the instructions appearing on the machine, obtained a half-pint of milk from the reservoir of the machine, the reservoir being situated within the shop. The respondent's shop was locked, the blinds were drawn, no goods were exhibited for sale, and it was not possible for any would-be customer to obtain access to the interior of the shop.

On behalf of the appellants it was contended that there was a complete legal contract of sale created between the inspector and the respondent when the former put his penny in the slot and received the milk; that the sale of milk as found in the manner described was a carrying on of a retail trade or business in a shop within the definition of s. 19 (1) of the Act; that the sale was carried out when the shop ought to have been closed for the usual weekly half-holiday; and that, consequently, there had been an infringement of the provisions of s. 4. It was further contended that the respondent had carried on his retail trade or business of a dairyman in a place not being a shop at a time when it was unlawful to keep a shop open for the purpose, and that, therefore, there had been a contravention of the provisions of s. 9. On behalf of the respondent it was contended that there was no "serving of customers" within the meaning of s. 4 (1) of the Act by using the automatic machine; that the respondent did not carry on on the day in question the retail trade or business of a dairyman in a place which was not a shop; and that s. 9 did not apply to automatic selling wherever it was carried on.

The justices found that there had been no infringement of the Act by the setting up of the automatic machine; that on the day in question the respondent's shop had been closed for the serving of customers within the meaning of s. 4; and that, as the automatic machine formed a part of the respondent's shop, there had been no carrying on by the respondent of the retail trade or business of a dairyman in a place which was not a shop. They therefore dismissed both informations.

The sections of the Shops Act, 1912, referred to in the case are sufficiently set out in the headnote. A

Macmorran, K.C., and *Rentoul* for the appellants.
Colam, K.C., and *Woodcock* for the respondent.

RIDLEY, J.—The question that arises for our decision in this case is whether the respondent has done anything in contravention of s. 4 or of s. 9 of the Shops Act, 1912. In other words, did the respondent omit to have his shop closed for the serving of customers according to law, or did he carry on his retail trade or business of a dairyman at a place other than a shop during the prohibited period when his place of business should have been closed. I must confess that the case on the whole is not free from difficulty, but I have come without any doubt to the conclusion on the second point, that as the reservoir containing the milk was inside the shop, and as the milk was simply obtainable from this reservoir by means of a mechanical contrivance fixed to the door, the place where the milk was supplied was part of the shop, and that there was no carrying on of the retail trade or business of a dairyman at a place not being a shop. B C

That point being disposed of, it is only necessary to consider s. 4 of the Act. There are two ways in which this section may be read. The expression "for the serving of customers" may mean, as has been contended on behalf of the appellants, that a person who is able to get goods is a customer who has been served, although there has been no personal service to him by any of the shop assistants. In one sense it may be said that such a customer is served because the automatic machine has been provided and put in a place where it is for the use and benefit of those who wish to take advantage of it. On the other hand, the expression may be used exclusively to mean the personal serving of customers. This is where the difficulty arises. We have to choose between the two interpretations of the section which I have just mentioned. The Shops Act, 1912, was undoubtedly passed for the benefit of those persons who are engaged as shop assistants. It must not be forgotten, however, that any infringement of its provisions is visited with penalties, and consequently the utmost care is required in the construction of those provisions. Of course we must give the statute a fair reading, but we must not be too wide in our construction. As the Act was really intended, as I have said, for the benefit of those who were engaged as shop assistants, it must not be lost sight of that there is nothing in it to prevent people buying goods so long as their doing so in no way interferes with its provisions. I should never assent to any construction of the Act which would prevent shop assistants obtaining their weekly half-holiday. But I do not think that we can so construe it as to make it apply to the supply of articles by automatic machines unless the language of the Act compels us to do so. D E F G

In my opinion, s. 4 is satisfied by reading the words "for the serving of customers" as meaning "for the personal serving of customers." The construction contended for on behalf of the appellants appears to me to be going too far beyond the object of the Act. In the present case the respondent has not, by his action, done anything to interfere in the least with the weekly half-holiday of his shop assistants. The shop was locked up, the assistants were away, and the automatic machine, previously filled with milk, did not require the personal attendance of anyone to enable a customer to obtain a supply of milk if he wished to get any. As I stated at the beginning, I have felt some difficulty as to this case, but upon the whole I think that the narrower construction of s. 4—namely, personal service—is the correct one. In my view, therefore, the justices were quite correct in the decisions at which they arrived, and these appeals must be dismissed. H I

AVORY, J.—I must also admit that I have felt some considerable doubt as to these cases, but upon the whole I shall content myself with expressing my doubt and I shall not differ from the conclusion arrived at by RIDLEY, J. There cannot, I think, be any disagreement as to the primary object of the Shops Act, 1912

—namely, to secure a weekly half-holiday for shop assistants. But it appears to me that the legislature may have thought that that object might best be secured by imposing an absolute prohibition upon the carrying on of a business of a shop on the weekly half-holiday. If that is the case the scheme of the legislature may be that shops are to be closed for all purposes of business on that particular afternoon. That appears to me to be quite a reasonable interpretation of the words "shall be closed for the serving of customers." I cannot help thinking that the construction which the court is putting upon the words of s. 4—namely, that they are to be held to be limited to the personal serving of customers—is a narrow construction, but, at the same time, I am not prepared to differ from the view that it is a possible construction of the words "the serving of customers."

As to s. 9 of the Act, I do not think that this case comes within it at all. I agree that the business, whatever it was, carried on during the particular afternoon was carried on at the respondent's shop, and therefore s. 9 has no application at all. The real difficulty seems to me to be whether s. 9 ought to be limited in its operation by reference to s. 4. I think that this point must be left to be decided upon some future occasion when the question arises in a concrete form. At the present moment I have not formed any definite conclusion upon it. I agree that these appeals must be dismissed.

LUSH, J.—I also agree that the appeals should be dismissed, but, as the questions raised are of considerable importance, I propose to state the reasons for my decision. The case is one in which I think that it is most necessary to apply that fundamental rule—a rule founded on good sense rather than on law—that where words in a statute are capable of two different meanings, it is necessary to consider carefully, before determining which of the two meanings should be attributed to them, what is the peculiar mischief which the statute was intended to obviate. It is important to bear in mind that the Shops Act, 1912, is one of a series which began in the year 1892. Recollecting this fact, it seems to me to be quite clear that the one object which the legislature had in view in passing this statute was to restrict the hours during which persons engaged as shop assistants should be employed in serving customers. I quite agree with what counsel for the appellant said, that when we come to construe s. 4, and still more when we consider s. 9, the words used are quite capable of the meaning which he asks us to attribute to them—namely, that the shop shall be closed in such a way that no business at all shall be carried on during prohibited hours. But it must not be lost sight of that the legislature, as clearly appears from the Act itself, did not wish to debar people from obtaining goods which they might require during prohibited hours, but only to restrict the hours of employment of those who served customers. And bearing this in mind, I think that, if we reasonably can do so, we ought to adopt the other construction—namely, that the words used in s. 4 mean that the premises are to be closed in such a way that no one is to be employed to serve. It cannot be denied, as it seems to me, that the words are quite capable of that construction.

The justices arrived at the conclusion that the present case came within s. 4 so far as the question was concerned whether this was a shop or not. They also came to the conclusion that as there was no personal service during prohibited hours, there was no offence under s. 4. With that conclusion I agree, for the reason which I have already stated. It is quite true that this shop was not so effectively closed as to prevent customers from obtaining milk if they wished to do so; but it is equally true that it was effectively closed so far as any personal service of the purchaser was concerned. I cannot help being struck by the fact that in another statute passed in 1910, in which the intention of the legislature clearly was to prevent persons having a supply of goods, very different language was used from that employed in the Shops Act, 1912. The Act to which I refer is the Licensing (Consolidation) Act, 1910, and s. 61 of that Act does not speak of serving customers, but it actually prohibits the sale of intoxicating

liquor and the opening of licensed premises during certain hours. Why was not similar language used in the Shops Act, 1912, if the same thing was intended by the legislature? So far from its being used, the language actually employed is to my mind only intended to ensure that shop assistants shall not be in the shop. The justices have found that the shop was closed, and that there was no employment of the shop assistants. In my opinion, therefore, no offence was committed.

As to s. 9, I think that that section is a little more in counsel for the appellant's favour, because the language there used is:

> "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful in that locality to keep a shop open for the purposes of retail trade or business of that class."

But there again it is perfectly consistent with that language to say that what is prohibited is the personal carrying on of the business. The section must have the same meaning as s. 4, as, if not, the extraordinary result would follow that, whereas in a shop it is lawful to use an automatic machine, it is not lawful to use a machine for precisely the same goods in a place which is not a shop. I cannot conceive that the legislature intended to prohibit these machines in places not shops when it permits them to be used in shops. For these reasons I think that under s. 9 also it is the personal carrying on of the trade or business that is forbidden.

Appeals dismissed.

Solicitors: *W. G. Greig*; *Charles May.*

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

BRITISH COLUMBIA ELECTRIC RAIL. CO., LTD. *v.* LOACH

[Privy Council (Viscount Haldane, Lord Parker of Waddington and Lord Sumner), July 6, 7, 26, 1915]

[Reported [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 8 W.W.R. 1263; 32 W.L.R. 169; 20 C.R.C. 309; 23 D.L.R. 4]

Negligence—Effective cause—Responsibility—Negligence by person killed in accident—Subsequent failure by defendant, due to negligence, to avoid accident.

When a situation of imminent peril has been created either by the joint negligence of both the plaintiff and the defendant or by the plaintiff alone in which, after the danger is apparent or should be apparent, there is a period of time during which either or both might avert the impending disaster, and if, notwithstanding the difficulties of the situation, efforts to avoid the injury duly made would have been successful but for some self-created incapacity which renders the efforts inefficacious, the negligence which produces such disability is not merely part of the inducing causes, but is the efficient, proximate, and decisive cause of the incapacity, and, therefore, of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence constitutes the ultimate negligence rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff.

Two persons drove a laden cart and horses on to a level crossing without taking reasonable precautions to see that the line was clear. They became aware of a tram-car owned by the appellant company approaching them 150 yards away but they were then unable to do anything to prevent an accident.

The driver of the tram-car saw the cart when he was 400 yards away from the crossing and at once applied his brakes, but they were defective and inefficient, and he could not stop the tram-car in time and overran the crossing some distance, knocking over the cart and killing one of the men. The brakes of the tram-car had been in a defective condition when the tram-car came out in the morning. The jury found that the tram-car was travelling at an excessive speed but could have stopped in time to prevent an accident if the brakes had been in working order.

Held: the negligence of the appellant company was the sole cause of the accident and, therefore, they were liable notwithstanding the contributory negligence of the deceased.

Judgment of ANGLIN, J., in *Brenner* v. *Toronto Rail. Co.* (1) (1907), 13 O.L.R. 423, applied and approved.

Notes. The common law rule that contributory negligence was a complete defence to a claim in negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1): 17 HALSBURY'S STATUTES (2nd Edn.) 12.

Applied: *Columbia Bitulithic* v. *B.C. Electric* (1917), 55 S.C.R. 1; *Critchley* v. *C.N.R.*, [1917] 2 W.W.R. 538; *Ontario Hughes-Owens* v. *Ottawa Electric* (1917), 40 O.L.R. 614; *McGintie* v. *Gougreau*, [1921] 3 W.W.R. 250; *Campbell* v. *C.P.R.*, [1920] 3 W.W.R. 182; *Allen* v. *Edmonton*, [1930] 2 W.W.R. 25; *Jeremy and Jeremy* v. *Fontaine*, [1931] 3 W.W.R. 203; *Topping* v. *Oshawa Street Railway Co.* (1931), 66 O.L.R. 618; *Shust* v. *Harris*, [1936] 2 W.W.R. 54; *Reopel et al.* v. *Ross*, [1937] 4 D.L.R. 571; *Barr* v. *Miller*, [1938] 2 W.W.R. 563; *Towne* v. *B.C. Electric Railway Co.*, [1943] 3 D.L.R. 572; *Cubit* v. *Fortin* (*No. 2*), [1945] 1 W.W.R. 147; *Maltais* v. *C.P.R.*, [1950] 2 W.W.R. 145; *Service* v. *Sundell* (1929), 45 T.L.R. 569. Considered: *Cooper* v. *Swadling* (1929), 46 T.L.R. 73; *Hargrove* v. *Burn* (1929), 46 T.L.R. 59; *M'Lean* v. *Bell*, [1932] All E.R.Rep. 421; *Vaile Bros.* v. *Hobson, Ltd.*, [1933] All E.R.Rep. 447; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1934] 2 K.B. 132; *The Eurymedon*, [1938] 1 All E.R. 122. Distinguished: *Parsons* v. *Toronto Railway Co.* (1919), 45 O.L.R. 627; *Griffin* v. *Cape Breton Electric Co.* (1921) 63 D.L.R. 251; *Clark* v. *C.N.R.* (1922), 67 D.L.R. 674; *Morris* v. *Hamilton Radial Electric Railway Co.* (1922), 52 O.L.R. 120; *Skidmore* v. *B.C. Electric Railway* (1922) 68 D.L.R. 32; *St. John Motor Line Ltd.* v. *C.N.R.* (1929) 2 M.P.R. 55; *Maltais* v. *C.P.R.* (1951), 67 *C.R.T.C.* 103; *Compania Mexicana de Petroleo "El Aguila"* v. *Essex Transport Co.*, [1929] All E.R. Rep. 589. Referred to: *Sitkoff* v. *Toronto Railway Co.* (1916), 36 O.L.R. 97; *Field* v. *Sarnia Street Railway* (1921), 50 O.L.R. 260; *Grand Trunk Pacific Railway Co.* v. *Earl*, [1923] S.C.R. 397; *Nelson* v. *Dennis & Dennis*, [1930] 1 W.W.R. 656; *Stanley* v. *National Fruit Co., Ltd.*, [1931] S.C.R. 60; *B.C. Electric Railway Co.* v. *Key*, [1931] 3 D.L.R. 587; *Veniot et al* v. *Black et al.*, [1933] 2 W.W.R. 198; *Wageler* v. *Craig*, [1937] 3 W.W.R. 513; *McLean* v. *McConnell*, [1938] O.R. 37; *Whitehead* v. *North Vancouver*, [1939] 1 W.W.R. 369; *Servhall* v. *T.T.C.*, [1939] S.C.R. 287; *Jacobson* v. *Vancouver, Victoria & Eastern Railway Co.*, [1941] 3 D.L.R. 140; *Lind* v. *C.P.R.*, [1942] 3 W.W.R. 577; *Alonzo* v. *Bell et al.*, [1942] 3 W.W.R. 657; *Eggins* v. *Beechey*, [1943] 2 D.L.R. 699; *Leadbetter* v. *Western Shoe Co., Ltd.*, [1944] O.W.N. 238; *Ozas* v. *Pfeifer & Moore's Taxi Ltd.*, [1946] 3 D.L.R. 527; [1946] 2 W.W.R. 305; 54 Man.R. 183; *Harper et al.* v. *Knechtels, Ltd.*, [1947] O.W.N. 697; *Starr* v. *Winnipeg Electric Co.*, [1949] 4 D.L.R. 692; *Nance* v. *B.C. Electric Railway Co.*, [1950] 3 D.L.R. 64; *Gard* v. *Slobodian* (1951), 4 W.W.R. (N.S.) 97; *Porter & Co.*, v. *Irving Oil Co.*, [1954] 3 D.L.R. 295; *Kinnear* v. *Nova Scotia Light & Power Co.* (1957), 8 D.L.R. (2d) 762; *Singleton Abbey* (*Owners*) v. *Paludina* (*Owners*), [1926] All E.R.Rep. 220; *Duncan* v. *Cammell Laird, Ltd.* (1944), 171 L.T. 186; *Admiralty Comrs.* v. *North of Scotland, etc., Steam Navigation Co.*, [1947] 2 All E.R. 350.

As to effective cause of accident, see 28 HALSBURY'S LAWS (3rd Edn.) 27 et seq.; and for cases see 36 DIGEST (Repl.) 177 et seq.

Cases referred to:

(1) *Brenner* v. *Toronto Rail. Co.* (1907), 13 O.L.R. 423; 9 O.W.R. 198; reversed 15 O.L.R. 195; 8 C.R.C. 100; affirmed (1908), 40 S.C.R. 540; 8 C.R.C. 108; 36 Digest (Repl.) 138, **1106.*

(2) *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573; 27 L.J.C.P. 322; 5 Jur.N.S. 222; 6 W.R. 693; 141 E.R. 231, Ex. Ch.; 36 Digest (Repl.) 170, *912.*

(3) *Rice* v. *Toronto Rail. Co.* (1910), 22 O.L.R. 446; 12 C.R.C. 98.

(4) *Snow* v. *Crow's Nest Pass Coal Co.* (1907), 13 B.C.R. 145.

(5) *Scott* v. *Dublin and Wicklow Rail. Co.* (1861), 11 I.C.L.R. 377.

Appeal by the defendant company by special leave from a judgment of the Court of Appeal for British Columbia, dated Jan. 6, 1914, and reported 6 W.W.R. 322, setting aside a judgment of MURPHY, J., at the trial in favour of the defendant company, dated Sept. 5, 1913.

On Aug. 3, 1912, Benjamin Sands, while being driven by one Hall along the highway and across the track of the appellants' tram line, was run into and killed by a tram-car. The action was brought against the appellant company by the present respondent Loach, the administrator of the deceased man's estate, on behalf of his widow and children, claiming damages under the Families' Compensation Act, R.S.B.C., 1911, c. 82, for Sands' death, caused by the alleged negligence of the company. The trial judge dismissed the action, but the Court of Appeal by a majority reversed the decision and entered judgment for the plaintiff in accordance with the amount awarded by the jury. The company appealed.

Dickens, K.C., and *Tyrrell T. Paine* for the appellants.

D. G. Macdonell, of the Canadian Bar, for the respondent, was not called on.

July 26, 1915. The considered judgment of their Lordships was delivered by

LORD SUMNER.—This is an appeal from a judgment of the Court of Appeal of British Columbia in favour of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light, and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went "right on to the track," when he heard Sands, who was sitting on his left, say "Oh," and looking up saw the car about 50 yards off. He says he could then do nothing, and with a loaded waggon and horses going two to three miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the cart and clear the rails. The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it could be stopped. It approached the crossing at from thirty-five to forty-five miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be 10 ft. or 12 ft. from the nearest rail, and he at once applied his brake. He was then 400 ft. from the crossing. If the brake had been in good order it should have stopped the car in 300 ft. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be

no mistake in the matter, and their finding stands. It cannot be restricted, as the trial judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly-braked car, or to a finding that there was no negligence except the "original" negligence of sending the car out ill-equipped in the morning.

Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car, and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered. It was for the jury to decide which portions of the evidence were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing-up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and there was then nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective, he could, as the jury found, have pulled up in time. Indeed, he would have had 100 ft. to spare. If the car was 150 ft. off when Sands looked up and said "Oh," then each had the other in view for 50 ft. before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. "You cannot charge up the same negligence under different heads," said MURPHY, J., at the trial; "you cannot charge it up twice." That learned judge observes on the question of ultimate negligence

> "that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company has any opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect I think it was original negligence and not what may possibly be termed 'ultimate negligence.'"

In the Court of Appeal MACDONALD, C.J.A., delivering a dissentient judgment in favour of the present appellants, says:

> "Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate

negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame of the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved."

So, too, McPHILLIPS, J.A., also dissenting, says:

"Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendant, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff . . . The motorman after he saw the vehicle could not have stopped the car . . . therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death."

These considerations were again urged at their Lordships' Bar under somewhat different forms. It was said (i) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (ii) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the facts. The consequences of the deceased's contributory negligence continued, it is true, but after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman* (2), his contributory negligence will not disentitle him to recover "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second. Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *Toronto Rail. Co.* (1), when ANGLIN, J., delivered a very valuable judgment in the Divisional Court. The decision of the Divisional Court was reversed on appeal, but on other grounds, and in their comments on the decision of the Divisional Court, DUFF, J., in the Supreme Court, and also CHANCELLOR BOYD, in *Rice* v. *Toronto Rail.* (3) (22

A O.L.R., at p. 450), and HUNTER, C.J., in *Snow* v. *Crow's Nest Pass Coal Co.* (4) (13 B.C.R., at p. 155) seem to have missed the point to which ANGLIN, J., had specially addressed himself. The facts of that case were closely similar to those in the present appeal, and it was much relied on in argument in the court below. ANGLIN, J., following the decision in *Scott* v. *Dublin and Wicklow Rail. Co.* (5) observes as follows (13 O.L.R. at pp. 437, 439, 440):

B "Again, the duty of the defendants to the plaintiff, breach of which would constitute ultimate negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with sufficient emergency appliances ready and in condition to meet the requirements of such an C occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff, to avoid the consequences of her negligence by the exercise of ordinary care . . . Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid D the mischief, though the result of an antecedent want of care, was negligence which occurred in the sense of becoming operative immediately after the duty in the breach of which it consisted arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty.

But there is a class of cases, when a situation of imminent peril has been created either by the joint negligence of both the plaintiff and the defendant, E or it may be that of the plaintiff alone, in which, after the danger is, or should be, apparent, there is a period of time of some perceptible duration during which both, or either, may endeavour to avert the impending catastrophe. . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful but for some self-created incapacity, which rendered such efforts inefficacious, the negligence that pro- F duced such a state of disability is not merely part of the inducing causes—a remote cause or a causa sine qua non—it is in very truth the efficient, the proximate, the decisive cause of the incapacity, and, therefore, of the mischief. . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may in some cases, though anterior in point of time to the plaintiff's negligence, constitute ulti- G mate negligence rendering the defendant liable, notwithstanding a finding of contributory negligence of the plaintiff. . . ."

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. H If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its J application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt, but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method, and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrongdoer the responsibility

for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of acts of responsible human beings, between the damage done and the conduct, which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. "Efficient or effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "causa causans," on the one hand, as against, on the other, "causa sine qua non," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification. In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

A B C D E F

Solicitors: *Linklater, Addison & Brown*; *Blake and Redden.*

[*Reported by* W. E. Reid, Esq., *Barrister-at-Law.*]

NELSON v. JAMES NELSON & SONS, LTD.

[COURT OF APPEAL (Lord Reading, C.J., Kennedy, and Swinfen Eady, L.JJ.), March 3, 4, 1914]

[Reported [1914] 2 K.B. 770; 83 L.J.K.B. 823; 110 L.T. 888; 30 T.L.R. 368]

Company—Director—Managing director—Termination of appointment—Breach of agreement—Power to revoke appointment in articles—Power subject to agreement.

By one of a company's articles of association the board of directors was given power to appoint one or more of their number to be a managing director or managing directors "with such powers and authorities and for such period as they may deem fit and may revoke such appointment."

N. was appointed joint managing director of the company under an agreement by which he was to hold office as long as he should remain a director of the company, retained his due qualifications, and efficiently performed the duties of his office. The board of directors passed a resolution dismissing N. from his position as managing director without notice. In an action by N. against the company for damages for breach of the agreement,

Held: the article did not give the board of directors power to revoke the appointment of a managing director notwithstanding any engagement which they might have made and notwithstanding the terms of any agreement into which they had entered to engage any person as managing director of the company for a term of years; the power conferred by the article was subject to the terms of the agreement; and, therefore, the plaintiff was entitled to succeed.

Notes. Considered: *Re Golomb and Porter & Co.'s Arbitration* (1931), 144 L.T. 583; *Southern Foundries* (1926) *Ltd.*, v. *Shirlaw*, [1940] 2 All E.R. 445; *Read* v. *Astoria Garage* (*Streatham*), *Ltd.*, [1952] 2 All E.R. 292. Referred: *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.*, [1926] All E.R.Rep. 498; *Shindler* v. *Northern Raincoat Co., Ltd.*, [1960] 2 All E.R. 239.

As to managing directors, see 6 HALSBURY'S LAWS (3rd Edn.) 297–298; and for cases see 9 DIGEST (Repl) 556 et seq.

Cases referred to:

(1) *Thomas Logan, Ltd.* v. *Davis* (1911), 104 L.T. 914; 55 Sol. Jo. 498; affirmed 105 L.T. 419, C.A.; 9 Digest (Repl.) 556, *3679*.

(2) *Boschoek Proprietary Co., Ltd.* v. *Fuke*, [1906] 1 Ch. 148; 75 L.J.Ch. 261; 94 L.T. 398; 54 W.R. 359; 22 T.L.R. 196; 50 Sol. Jo. 170; 13 Mans. 100; 9 Digest (Repl.) 616, *4100*.

Also referred to in argument:

Bluett v. *Stutchbury's, Ltd.* (1908), 24 T.L.R. 469, C.A.; 9 Digest (Repl.) 557, *3686*.

Horn v. *Henry Faulder & Co., Ltd.* (1908), 99 L.T. 524; 9 Digest (Repl.) 578, *3824*.

Quin and Axtens, Ltd. v. *Salmon*, [1909] A.C. 442; 78 L.J.Ch. 506; 100 L.T. 820; 25 T.L.R. 590; 53 Sol. Jo. 575; 16 Mans. 230, H.L.; 9 Digest (Repl.) 498, *3283*.

Eley v. *Positive Government Security Life Assurance Co.* (1876), 1 Ex.D. 20; 45 L.J.Ex. 58; 33 L.T. 743; 24 W.R. 252; affirmed 1 Ex.D. 88; 45 L.J.Ex. 451; 34 L.T. 190; 24 W.R. 338, C.A.; 9 Digest (Repl.) 580, *3832*.

Appeal from a judgment of SCRUTTON, J., [1913] 2 K.B. 471, with a jury in an action brought by the plaintiff claiming damages for breach of contract. The plaintiff was awarded £15,000 damages by the verdict of the jury and the defendants now appealed.

The defendant company's articles of association included the following:

"84. The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration, and advertising of the company, and the issue of its capital, including brokerage and commissions for obtaining applications for or placing shares. The board may exercise all the powers of the company, subject nevertheless to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting, but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulation had not been made.

"85. Without restricting the generality of the foregoing powers the board may do all the following things: . . . (b) appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration (including the payment of a commission varying with the amount of the company's profits), and with such powers and authorities and for such period as they deem fit, and may revoke such appointment.

"94. The office of director shall be vacated . . . (b) if he become of unsound mind, bankrupt, or compound with his creditors . . . (c) if he be absent from the board meetings continuously for six months without the consent of the board.

"96. At the ordinary general meeting in the year next but one after the year in which the company is incorporated, and at the ordinary general meeting in every subsequent year, one-third of the directors for the time being, or if their number be not a multiple of three, then the number nearest to one-third shall retire from office. A managing director holding that office for an unexpired term shall not be subject to retirement under this clause or be taken into account in ascertaining the number of directors to retire.

"100. The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term) before the expiration of his period of office, and may by an ordinary resolution appoint another qualified person in his stead."

Younger, K.C., Shearman, K.C., and *Bremner* for the defendants.
Leslie Scott, K.C., Austen-Cartmell and *L. F. C. Darby* for the plaintiff.

LORD READING, C.J.—This is an appeal by the defendant company from a judgment of SCRUTTON, J., for £15,000 awarded to the plaintiff by the verdict of the jury; and the defendants ask now that the judgment should be reversed and judgment entered for them, or, in the alternative, that there should be a new trial as to the amount of damages, which was the only question left to the jury. The main argument upon which the appellants have based their objection and criticism with regard to the learned judge's judgment is entirely dependent upon the view taken by the court of certain words in art. 85 (b) of the articles of association of the company. In my opinion the whole question turns upon the meaning which we give to the words at the end of art. 85 (b), "and may revoke such appointment." On the one hand, if we take the view which counsel for the defendants argued strenuously before us yesterday, then the result would be that judgment should be entered for the defendants. On the other hand, if we differ from that view, and accept the view adopted by the learned judge, then the only question is one of the damages. So that in substance really the question here is, I will not say simple, but it is short as to the meaning of those particular words.

In order to make the point quite clear it is necessary to state the facts, which I shall attempt to do very briefly. Mr. T. C. Nelson, the plaintiff in this action, was on Jan. 16, 1908, appointed managing director of the defendant company under an agreement in writing. That company had been formed in 1892 to amalgamate certain businesses connected with the meat trade. Originally in

1893 two managing directors were appointed, Mr. William and Mr. Edward Nelson. It is unnecessary for me to refer in detail to that agreement, but substantially it was one which appointed them at high salaries on undoubtedly very excellent terms for themselves and, as was thought by the directors of the company, on very excellent terms for the company. On Sept. 13, 1904, Mr. T. C. Nelson was for the first time appointed managing director jointly with Mr. Edward Nelson of this company, Mr. William Nelson having resigned. At this time Mr. Thomas Nelson carried on business in Glasgow also in connection with the meat trade. He entered into an agreement in 1904, which is an agreement in writing, and is dated Dec. 6, 1904. I do not propose to read that agreement, or to refer to it, because it seems to me unnecessary for the point which we have to decide.

In 1908 Mr. Thomas Nelson left Glasgow, apparently at the desire of the directors, and took up his residence in Liverpool; and then the new agreement of Jan. 16, 1908, which is the agreement now sued upon, was entered into between him and the company. That agreement is undoubtedly one to which reference should be made having regard both to the point of law raised and the summing up of the learned judge as to damages. It first of all recites the facts, to which I have already called attention, in the earlier part of the history of the company leading up to the making of this agreement. Then, by cl. 1, Mr. Thomas Nelson is appointed joint manager of the company with Mr. Edward Nelson to carry on the practical part of the company's business under the general control of the board of directors of the company. By cl. 2 he was to hold office as long as he should remain a director of the company, and retained his due qualification, and should efficiently perform the duties of the office. By cl. 3 he was to devote his time to the company's service, and well and faithfully serve them. Clause 4 provided that he was to receive a salary of £3,000 a year. Clause 5 gave him the right to determine the agreement by six months' notice. Clause 6 was to the effect that if the tenure of his office was determined in consequence of the winding-up of the company he was not entitled to claim any damages against the company. Clause 7 dealt with the businesses which were then being carried on. and provided that he was not to carry on any other business, or be directly or indirectly concerned in any other business, always subject to the businesses described; that is to say, firms in which he was then interested as principal could be supervised by him, and, subject to that right which was reserved to him, he agreed to devote his time entirely to the company. In August, 1912, the plaintiff returned from the Argentine, which he had visited on the business of the company. On Aug. 9 the minute was passed of that date which has been read, the subject of which was Mr. Edward Nelson had said that he would not work any longer with Mr. Thomas Nelson, and the view taken by the board then was that it would be necessary for Mr. Thomas Nelson to retire. Some letters passed, but the effect of those letters was that Mr. Thomas Nelson declined to retire, and then the board, by letter of Sept. 10, 1912, gave him notice, and I will read the exact words because they may be of some importance. The company sent him this letter containing this resolution of the company:

> "Resolved that the appointment of Mr. Edward Nelson and Mr. Thomas Cormac Nelson as managing directors of the company be and the same are hereby revoked."

Then follows a resolution appointing Mr. Edward Nelson managing director of the company, and directing the entering into of an agreement with him. In consequence of that notice to the plaintiff, because the company undoubtedly treated that as a revocation of the agreement with him, and gave him notice to that effect by the letter of the secretary, a writ was issued by the plaintiff, and it is that action which was tried before SCRUTTON, J., and a special jury.

It appears from those facts, to which I have called attention, that the company, unless they were justified in revoking the appointment, had no ground whatever in law for putting an end to the agreement with the plaintiff. In fact, it is not

contended that they had any such right. What is said, and what was said before SCRUTTON, J., is that under art. 85 (b) the directors of the company to whom the plaintiff company had delegated its powers in this respect were, it is true, entitled to appoint managing directors, but were also entitled to revoke such appointment, and it is contended that the effect of that article is that the directors could not make an appointment without reserving to themselves the right also to revoke the appointment. It is said, as I understand the argument, that if the directors purported to make an agreement for a period of years without reserving to themselves such a power of revocation, they were acting ultra vires. It is put in another way, that is, that the directors in any agreement that they made must be taken to have inserted in that agreement a clause entitling them to revoke the agreement. Those are the alternative ways of putting the proposition which has been argued before us.

The material words of the article under the heading "powers of directors" are as follows: Article 84 says that "the business of the company shall be managed by the board." Article 85 says, "without restricting the generality of the foregoing powers," the board may do the following things:

> "Establish local boards, local managing committees, or local agencies in the United Kingdom or abroad, and appoint any person to be members thereof, with such powers and authorities, under such regulations, for such period, and at such remuneration as they may deem fit, and may from time to time revoke any such appointment."

Then comes the material article, art. 85 (b):

> "Appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration (including the payment of a commission, varying with the amount of the company's profits), and with such powers and authorities and for such period as they may deem fit, and may revoke such appointment."

Here the directors on behalf of the company had entered into an agreement, which may be described, subject to certain contingencies for which provision is made in the agreement, as one which provided for the efficient business life of Mr. Thomas Nelson—that is to say, subject to the contingencies in the agreement there was no power on the face of that agreement to determine the appointment at any time. There are certain conditions which are laid down, on the happening of which the agreement would come to an end; but, except for those conditions, the right was reserved to the plaintiff to determine the agreement by six calendar months' notice, but there is no such corresponding right reserved to the directors of the company. As long as the plaintiff remained a director and retained his due qualification, and efficiently performed the duties of his office, and well and faithfully served the company and attended to its business affairs, and as long as the company was not wound-up, and as long again as Mr. Nelson did not infringe cl. 7 as to his interest in other businesses, Mr. Nelson was entitled to continue to serve the company and be paid his salary at the rate of £3,000 a year.

The company does not allege that any one of those conditions to which I have referred had been broken. They do not allege that any one of the events had happened; they do not say that anything had taken place which is mentioned in that agreement entitling them to put an end to the agreement. They rest their defence upon the contention that to make such an agreement without providing for the power of revocation by the directors of the company at will was ultra vires of the board and of the company, and consequently does not bind the company. I myself am quite unable to accept that contention. It seemed to me that the words in art. 85 (b) are very clear, and although we have heard a very ingenious and capable argument to the contrary, yet they can be construed by the application of the ordinary principles of this court so as to give them a fair and reasonable businesslike meaning. In my view art. 85 (b) was for the purpose of giving certain specific powers to the directors of the company. Apart alto-

gether from the general powers which might be given under art. 84, it was intended that the company should delegate the specific powers enumerated in art. 85 to the board. One of those powers undoubtedly was to appoint a managing director (I draw particular attention to these words) "for such period and at such remuneration as they [the board] may deem fit," which would imply that the board had, under this article, power to appoint for a period of years, and when the words which immediately succeed those I have just read occur, "and may from time to time revoke any such appointment," that is really only giving the directors power to take away that which they had given, provided that they had not bound themselves to give it for any period of time. It meant that they had both powers: not only the power of appointment, but also the power of revoking the appointment. But it did not mean, in my view, and cannot be held to mean, that it gave them the power of revocation, notwithstanding any engagement which they might have made, and notwithstanding the terms of any agreement into which they had entered to employ any person, or to engage any person as managing director of the company for a term of years. I am quite unable to give those words that construction. It seems to me if those words had not been inserted at the end of the article the result would have been that the power of appointment of the managing director would have vested in the directors of the company, and the power of revocation would have been vested not in the directors, but in the company to be exercised in the ordinary way, and what was intended was that to the directors should be delegated both the power of appointment and the power of revocation. But it only created powers, it did not make that power of revocation a condition of any appointment which might be made for any period of years. For these reasons I am unable to accept the argument of counsel for the defendants, and I agree with the view taken by SCRUTTON, J.

Our attention was called to a number of authorities. In my judgment those authorities do not assist in arriving at the true construction of these words. They are not decisions upon those words or similar words. For myself, I do not think that we derive assistance from referring to other cases dealing with other words and other articles in order to construe the articles of this company. I agree that they are of value, and it was no doubt for that purpose that they were cited by counsel for the defendants, to show what the law is with reference to the position of the directors and of the company when somewhat similar articles are prepared to govern the proceedings of the company. But they do not, in my judgment, assist upon the construction, and therefore I do not propose to refer to them further in detail. For these reasons I am of opinion that this appeal fails, and must be dismissed with costs.

KENNEDY, L.J.—I am of the same opinion. As to the construction of art. 85 of the articles of association in relation to the meaning of the word "revoke," I have come to the same conclusion as the learned judge, that the argument is impossible that "revoke" in this case can be read in the article in question as creating such a state of things that, if the article is obeyed, the directors must retain the power to put an end at will to any appointment they make under art. 85 (a) or art 85 (b), or to any contract into which they enter, although by the terms of the contract itself they have stipulated for its continuance. And I think it is impossible to adopt the view which the appellants ask us to adopt. We have had the IMPERIAL DICTIONARY quoted as an authority, or at any rate, as affording some help to us in saying that "revoke" means to "put an end to summarily"; "to put an end to without notice." I think in the absence of its being really a term of art or having some special trade meaning or sense, one must construe a word like "revoke" as we are entitled to construe any initial word, according to its context. "Revoke" or "recall," which ever you like, means no doubt to put an end to an authority or an appointment, as the case may be, but not necessarily to put an end to it without giving any notice which by the terms, for instance, of the agreement, where a notice is stipulated for you ought to give. According to the

defendants' argument if it is a life appointment, it would entitle the directors to say, "although we have entered into a contract with you for the term of your natural life or for any less period, we are told under 85 (b), that it is our duty, if we can intra vires with the article, to revoke it, and 'revoke' entitles us, and indeed binds us, if we think it is in the interests of the company, and as members of the board of directors, to summarily cut short the appointment contrary to the terms of the contract." Read, as I think the words must be reasonably read, "revoke" is the co-relative in 85 (a), (b), according to the ordinary rules of the construction of English, of "appoint." You may appoint, and you may revoke. That is what is said to the board of directors. If I wanted to use a verb to say I wish to put an end to an appointment, the natural word, I should go as far as to say, is "revoke." You cannot say "dismiss the appointment," you cannot say "discharge the appointment." You could say "put an end to the appointment" no doubt, but it would be to my mind a clumsy, and certainly a not very natural, form of expression. You are to "revoke"; you may make an appointment and you may revoke that appointment. I see no authority either in sense or in grammar to make me read the word "revoke" as anything different to this: "You may put an end to the appointment, and of course, as I have told you, to make that appointment under such regulations and for such period and for such remuneration as I think fit, I, representing the board, say it means, 'put an end to the appointment in accordance with the terms of the contract, the making of which has been intrusted to you by the article.' "

With regard to the cases that were cited to us, I do not think they help us. Take, for example, the case before WARRINGTON, J., of *Thomas Logan, Ltd.* v. *Davis* (1). As I have tried to understand it (I hope not unsuccessfully) I think the question there was whether or not under the terms of certain articles the appointment of a sole managing director was vested by the terms of the articles in the directors, or whether the matter was governed by art. 113 which authorised, so to speak, the revision in certain cases of the acts of the directors by the company in general meeting. It was a pure question of construction of those articles that had to be decided. There is no question, as it seems to me, here that, excepting the meaning of the word "revoke," the power to appoint and the power or revocation or putting an end to the appointment are vested by these articles in the directors. To my mind the words "may appoint" and "may revoke" mean "we have intrusted to you the appointment subject to such regulations for such period and at such remuneration as you may think fit." So with regard to the managing directors in art. 85 (b) it means: "You may appoint such directors upon such remuneration and with such powers and authorities and for such period as you deem fit. We give you, the directors, the power and the duty to be exercised in accordance with the interests of the company. You are not to break your contract that we have empowered you to make; it is a power which we give to you, and we do not retain as a company the right to put an end to the appointment made in accordance with the contract which we have authorised you to make, and which we have divested ourselves of the power of making or of revoking." I think, therefore, in this case the appeal must be disallowed, and the judgment of the court below affirmed.

SWINFEN EADY, L.J.—I am of the same opinion. The defendants, by resolution of their board of Dec. 10, 1912, purported to revoke the appointment of the plaintiff as managing director of the company. There was no power of revocation contained in the agreement of Jan. 16, 1908, under which the plaintiff was engaged. The plaintiff had changed his position in Glasgow. He had parted with a quarter of his interest in his Glasgow business. He had agreed only to supervise that business, and, subject to that, to give all his time and attention to the business of the company, and he had entered into the agreement of Jan. 16, 1908, which provided that he should hold the office to which he was thereby appointed as long as he should remain a director of the company, and retained his

due qualification, and should effectually perform the duties of his office. The defendants did not claim to terminate the appointment or revoke it by virtue of any provision in the agreement, or by virtue of any contract whatever as between the plaintiff and the defendants; but their short point was that according to the true construction of the articles of association the directors had only power to appoint the plaintiff to be managing director subject to their right to revoke the appointment at any time. That was the only power they had, and, if by entering into the agreement of 1908 they have purported to grant to the plaintiff a longer term, it is immaterial, because, whatever they have purported to do, they had not power to do it. It is no question really, they say, of the construction of the agreement, because it is conceded that according to the true construction of that agreement the appointment is not a revocable one. There is nothing within the four corners of the agreement to point to revocation, but they say: "Our real point is that we had no power to appoint him except as a revocable appointment, and if you properly construe the articles of association of the company it is apparent that any appointment of managing director is one that may be revoked, and may be revoked at any time."

I apprehend, unless there is power in the articles to appoint a managing director it is not competent to the board to make such an appointment. That was determined in the case of *Boschoek Proprietary Co., Ltd.* v. *Fuke* (2). Therefore you have to look to the articles to see what the power is. The articles may give a power to the board to appoint one of their number to be a managing director, but with it no power to revoke or cancel or remove the appointment. That power may be a power which the company in general meeting or otherwise may keep and retain in its own hands. That would be the law if the company were registered under the statutory Table A. Table A, under the Companies (Consolidation) Act, 1908, art. 72, provides:

> "The directors may from time to time appoint one or more of their body to the office of managing director . . . at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation . . . but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

With an article in such a form it is quite manifest that where a managing director is appointed by the board, the board can only make the appointment subject to the company in general meeting being entitled to resolve at any time that his tenure of office of managing director is to be determined. In other words, he can with such articles as are in Table A only be appointed managing director with a right to the company in general meeting to determine the appointment at any time by passing a resolution to that effect. That would be the case if this company had been registered or had an article in the form of that article in Table A; but that is not the article we have to construe.

We have to construe the articles in the present case, and in particular art. 85 (a) (b). There are two other articles to which I wish to draw attention, because I think they do very much assist in arriving at the true construction of art. 85 (b), which is the article which gives to the board power to appoint one or more of their number to be managing director for such period as they deem fit, and it says that they may "revoke such appointment." The Lord Chief Justice has already drawn special attention to the words "they may appoint for such period as they deem fit." That contemplates a definite period of appointment, and not merely an appointment to hold his office at the will and pleasure of the board. "A period" there means a definite period. That is emphasised when you refer to the other two articles, 96 and 101. The former is the article which provides for the retirement of directors at the ordinary general meeting. Then it provides:

"A managing director holding that office for an unexpired term shall not be subject to retirement under this clause, or be taken into account in ascertaining the number of directors to retire."

That is to say, it contemplates there shall be a managing director holding that office for an unexpired term. It contemplates that he shall be appointed for a term. So again art. 101 says:

"The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term),"

using the same phrase. To my mind, it is clear that these articles contemplate that the board may make an appointment of managing director for a definite term. In my judgment that is absolutely inconsistent with the power in the board to revoke the appointment at any time. Of course I assume that the board would act reasonably, and do what they considered to be in the best interests of the company, but in effect it would be that the board would have no power to appoint for a term; they would have no power to appoint except on the conditions that the managing director should hold his office at the will and pleasure of the board. If whenever they liked to pass a resolution it would determine ipso facto that is not an appointment for a term at all. You may put in for a term of ten or twenty or any term of years; it is purely nominal and fictitious if at any moment the board have power to say this: "Although we have put it in for a term, you merely hold your office at our will and pleasure, and we think it better in the interests of the company that your appointment should be determined and we resolve to determine it." True it is that the language of this article, "may revoke the appointment," is not quite in common form I will not say, but it is not in the more general form; the more general form is that given in PALMER'S COMPANY PRECEDENTS (11th Edn.), p. 738:

"The directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the company either for a fixed term or without any limitations as to the period for which he or they is or are to hold such office, and may from time to time remove or dismiss him or them from office and appoint another or others in his place."

It is obvious that an article in that form, where there is power to appoint for a fixed term with power to remove or dismiss, means power to remove subject to the terms of the existing contract between the company and the directors. So in the present case in my opinion this power to revoke an appointment means that the power is in the board to appoint and the power to dismiss or to revoke. But again revocation must be subject to the terms of the contracts subsisting for the time being between the managing director and the company. For these reasons I am of opinion that the defendants have not the power, which they claim, to revoke the appointment during the currency of the term for which the appointment was made merely by passing a resolution. In my opinion the appeal fails.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Lightbound, Owen & Co.*

[*Reported by* W. C. SANDFORD, ESQ., *Barrister-at-Law.*]

STOKE-ON-TRENT BOROUGH COUNCIL *v.* CHESHIRE COUNTY COUNCIL

[King's Bench Division (Lord Reading, C.J., Ridley and Avory, JJ.), June 11, 1915]

[Reported [1915] 3 K.B. 699; 85 L.J.K.B. 36; 113 L.T. 750; 79 J.P. 452; 13 L.G.R. 1077]

Child—Young person—Youthful offender—Reform school order—Residence of offender—"Where he has his bed and dwells"—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 74.

A person **held** to be deemed to reside where he lives, i.e., has his bed and dwells, for the purposes of s. 74 of the Children Act, 1908 [see now s. 70 (2) of the Children and Young Persons Act, 1933] which provided for the reception in a reformatory school of a youthful offender by the local authority within whose district "he resides."

Notes. Section 74 of the Children Act, 1908, has been repealed. Section 70 (2) of the Children and Young Persons Act, 1933, which deals with approved school orders, is in similar terms to the repealed s. 74, and provides: "Every approved school order . . . shall name the local authority within whose district the child or young person was resident, or if that is not known, the local authority or one of the local authorities within whose district the offence was committed or the circumstances arose (as the case may be) rendering him liable to be sent to an approved school."

Distinguished: *Yorkshire West Riding Council* v. *Colne Corpn.* (1917), 87 L.J.K.B. 120. Applied: *Berkshire County Council* v. *Reading Borough Council*, [1921] 2 K.B. 787. Referred to: *Sawyer* v. *Kropp* (1916), 14 L.G.R. 989; *L.C.C.* v. *Wiltshire County Council* (1927), 137 L.T. 526; *Isle of Wight County Council* v. *Warwickshire County Council*, [1953] 1 All E.R. 525.

As to approved school orders, see 21 Halsbury's Laws (3rd Edn.) 266–269. For the Children and Young Persons Act, 1933, see 12 Halsbury's Statutes (2nd Edn.) 974.

Cases referred to:

(1) *R.* v. *Inhabitants of North Curry* (1825), 4 B. & C. 953; 7 Dow. & Ry. K.B. 424; 3 Dow. & Ry. M.C. 451; 4 L.J.O.S.K.B. 65; 107 E.R. 1313; 38 Digest (Repl.) 590, *695*.

(2) *Blackwell* v. *England* (1857), 8 E. & B. 541; 27 L.J.Q.B. 124; 3 Jur.N.S. 1302; 120 E.R. 202; sub nom. *England* v. *Blackwell*, 30 L.T.O.S. 148; 6 W.R. 59; 7 Digest (Repl.) 97, *556*.

(3) *Lamb* v. *Smythe* (1846), 15 M. & W. 433.

Case Stated by justices for the county of Chester, sitting at Sandbach.

By s. 74 of the Children Act, 1908:

"(1) Where a youthful offender is ordered to be sent to a certified reformatory school, it shall be the duty of the council of the county or county borough in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified reformatory school suitable to the case, having regard to this part of the Act.... (3) For the purposes of the foregoing provisions of this section, a youthful offender or child shall be presumed to reside in the place where the offence was committed, or the circumstances which rendered him liable to be sent to a certified school occurred, unless it is proved that he resided in some other place. . . ."

Mackenzie, K.C., and *Horace Fenton* for the appellants.

Montgomery, K.C., and *Hugo Marshall* for the respondents.

LORD READING, C.J.—The question which arises for our decision in the present case is whether the youthful offender, Fryer, who was convicted of larceny

and sent to a reformatory resided at the time when the offence was committed within the county borough of Stoke-on-Trent, or whether he was residing within the area of the Cheshire County Council. The justices before whom the question came decided that the place of residence was within the county borough of Stoke-on-Trent, and it is against this decision that the Stoke-on-Trent Corporation are now appealing, since they maintain that upon the facts the place of residence was within the county of Chester.

Under s. 74 (3) of the Children Act, 1908, when an offence is found to have been committed by a youthful offender it is presumed that such youthful offender resides at the place where the offence was committed, unless it is proved that the actual place of residence is elsewhere. Under sub-s. (7) of the same section power is given to a local authority, where an order has been made declaring that a youthful offender is resident in their district, and consequently he is to be sent to a reformatory school under their jurisdiction, to apply to a petty sessional court, and that court, on proof that the youthful offender was resident in the area of another local authority, and, after giving such other local authority an opportunity of being heard, may (which is to be construed as "must") transfer the liability to maintain the youthful offender to that other local authority. In the present case the facts proved before the justices on the application under s. 74 (7) were that the youthful offender had been in the employment of a farmer named Kennerley, in Cheshire, in the month of October, 1914, and that on Nov. 2, 1914, he left the employment of Kennerley and took up a new employment with a farmer named Broad, at a place called Arclid, which is also in Cheshire. He worked there from Nov. 2 to Nov. 5, when he was arrested by the police, and was eventually convicted and sent to a reformatory. When the youthful offender was taken into the employment of Broad no time was fixed as to the duration of his employment. He slept at Broad's house, and he was supplied with food by Broad.

Taking all these facts into consideration, the question that arises is whether the justices were right in coming to the conclusion that the youthful offender was not resident at Arclid, in Cheshire, because his residence there was only of a temporary nature, and that, being under the age of sixteen years, he was constructively resident with his parents at their place of abode at Stoke-on-Trent. The justices came to the conclusion that the residence was primâ facie Stoke-on-Trent, and that the Stoke-on-Trent Corporation had failed to rebut the presumption that Stoke-on-Trent was the residence of the youthful offender. If there was evidence upon which the justices could arrive at that conclusion upon the facts proved before them, then even though we might have come to a different conclusion, we ought not to interfere with it. But if we come to the conclusion that upon the facts as proved it was not possible, as a matter of law, to hold that the youthful offender was constructively resident with his parents we should interfere. Upon the facts as set out in the Special Case I do not think that it can be said that there was evidence that at the time in question the youthful offender was resident with his parents. The justices did not come to the conclusion that he was actually resident with his parents, but only that he was constructively resident with them, and this is, to my mind, a most important consideration. The youthful offender was in fact living at Broad's farm, and the justices looked upon this as a residence of a temporary character only. I do not think that this is a proper way of construing the word "residence" in the section. Indeed, I do not see any reason why it should not be construed in the ordinary way, and with the ordinary meaning attached to the word. It is not a term of art, and under different statutes there are many decisions as to its meaning. In the present case we must, however, look at this Act and come to our conclusion upon this Act alone. The Act provides that it is to be presumed that the youthful offender resides where the offence was committed, unless it is proved that he resides elsewhere. A person resides where he lives—that is, where he has his bed, and where he dwells. Applying, then, that test, I cannot see any distinction between this case and that of a domestic servant, who may, between the age of twelve and sixteen years, enter

into employment. If a servant sleeps in the employer's house and is boarded there, and if the engagement is not of a merely casual nature, the place of residence of the servant is the same as that of the employer. There is nothing to indicate that the youthful offender's residence with Broad was of a temporary or casual nature. If it was of a temporary nature, every case of residence with an employer must be temporary. In one sense, of course, no employment is permanent. Though this employment only lasted two or three days, the boy was employed in the ordinary way. There is no statement in the case that his employment was merely casual. So far as I can see, the intention was that it should continue. For these reasons the justices' decision cannot stand, and the appeal must be allowed.

RIDLEY, J.—I am of the same opinion. By s. 74 (3) of the Act of 1908 it is provided that the youthful offender shall be presumed to reside in the place where the offence was committed. The offence was committed in Cheshire, and, therefore, he must be presumed to have resided in Cheshire, unless it is proved that he resided elsewhere. The justices have found that the residence was temporary, and that the boy had no definite settled employment, that he visited his father's home for the purpose of changing his clothes, and that, being under sixteen years of age, he was under the control of his parents, and constructively resided with them. The parents lived in the county borough of Stoke-on-Trent. Therefore the justices, having found what they did, decided that the residence of the youthful offender was also at Stoke-on-Trent. To my mind the justices were wrong in their reasoning. The residence of a person has been defined as the place where he eats, drinks, and sleeps. The authority for it is the ancient case of *R.* v. *Inhabitants of North Curry* (1), which was decided in 1825, in which BAYLEY, J., said:

> "Personal property cannot be rated unless the proprietor resides in the parish. Then the question is, what is the meaning of the word 'resides'? I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep."

This meaning of the word "residence" has been accepted as the one to be generally adopted, and although there are cases in which it can be shown that this definition is not always applicable, it is the presence of special circumstances which has caused a different meaning being given to the word. I need only refer to two cases by way of illustration, one is *Blackwell* v. *England* (2), which was cited before the justices, and the other is *Lamb* v. *Smythe* (3). In the present case the youthful offender ate, drank, and slept at Broad's house, and he was not there temporarily or as a casual visitor. He was in employment with the farmer Broad, and the mere fact that he had his clothes at his father's house and went to change them there did not constitute the parental home as his place of residence. And as the youthful offender was in employment on his own account, I do not think that the fact of his being under the age of sixteen makes any difference. In my opinion his place of residence was that of his employer and not that of his father, and for this reason I think that the justices came to an incorrect decision and that their order cannot be upheld.

AVORY, J.—I also agree that this appeal should be allowed, and I should not add anything to what has been already said, but for the contention on the part of the respondents' counsel that the question in the present case was one of fact. I do not concur in that contention. I think that it is a question of law. It is quite clear that the word "residence" is capable of various meanings, and that its particular meaning is to be gathered from the particular statute in which it appears. However, in the present statute I am satisfied that the meaning to be given to the word is the place where a person actually resides, as distinguished from the place where he may be said constructively to reside. If that is the

proper interpretation of the word the justices were wrong in law, for they have in effect decided that the statute is satisfied by holding that the youthful offender had a constructive residence with his father.

I think that they were also wrong in law in holding that there was any evidence from which they could arrive at the conclusion that the boy was residing with his father. As far as I can see from the Case Stated there was no evidence, either actual or constructive, of residence with the father. On both points I am quite satisfied that the justices came to a wrong conclusion and the appeal must be allowed.

Appeal allowed.

Solicitors: *Gibson & Weldon*, for *E. B. Sharpley, Town Clerk*, Stoke-on-Trent; *Philpot & Co.*, for *Reginald Potts*, Chester.

[*Reported by* J. A. Slater, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL OF SOUTHERN NIGERIA *v.* JOHN HOLT & CO. (LIVERPOOL), LTD., AND OTHERS, ET E CONTRA SAME *v.* W. B. MACIVER & CO., LTD., AND OTHERS, ET E CONTRA

[Privy Council (Lord Shaw, Lord Parker of Waddington and Lord Sumner), November 9, 12, 13, 16, 1914, February 9, 1915]

[Reported [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955]

Foreshore—Accretion of dry land—Artificial reclamation of foreshore—Property in foreshore unaltered.

Sea—Encroachment on land—Land lost becoming property of owner of foreshore.

Easement—Land—Storage of chattels thereon.

Where the sea recedes naturally, gradually and imperceptibly (i.e., that the recession is imperceptible in its course and progress, not imperceptible after a long lapse of time) from the land, and, as a result, part of the foreshore becomes situate above high-water mark, the resulting accretion of land is added to the dry land which it adjoins and becomes the property of the owner of that dry land. In the case of artificial reclamation, as distinct from natural accretion, the property of the foreshore as altered by the reclamatory work done on it remains as before. On the other hand, where the sea gradually encroaches on the land the owner of the land loses that part of his property, and it becomes the property of the owner of the foreshore. Properties described as abutting on the seashore and specifically measured or described in their conveyances or delineated on a plan are not excluded from the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea.

The respondents had for many years occupied land on the shore of the island of Lagos, and for their business as African merchants had built stores, wharves, and jetties by the water side, but this use and possession could not be established for a period of sixty years. To prevent incursion by the sea and erosion of the land they had erected a retaining wall on the soil of the foreshore and driven posts with the result that part of the foreshore was reclaimed from the sea and was used by the respondents as part of their land. In 1907

the government of the island began the construction of a road along the water-side which road passed through the accrued land and interfered with the respondents' use of it. Proceedings were commenced to determine the rights of the respondents as against the Crown so as to settle the basis upon which compensation should be paid them.

Held: the reclaimed land, not being the result of natural accretion, vested in the Crown as owner of the foreshore, but, in view of the length of the user by the respondents of the accrued land and the absence of objection by the Crown, that user could not be subverted and the respondents were entitled to compensation on the principle laid down in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1) (1872), L.R. 5 H.L. 418.

Held, further: an easement to use the reclaimed land for the storage thereon of casks, foods and produce was a good and valid easement.

Notes. Considered: *Copeland* v. *Greenhalf*, [1952] 1 All E.R. 809. Referred to: *Secretary of State for India in Council* v. *Fourcar & Co.* (1934), 50 T.L.R. 241; *Symes and Jaywick Associated Properties, Ltd.* v. *Essex Rivers Catchment Board*, [1936] 3 All E.R. 908; *Re Ellenborough Park, Re Davies, Power* v. *Maddison*, [1955] 2 All E.R. 38.

As to accretion by recession of the sea, see 33 HALSBURY'S LAWS (2nd Edn.) 522–525; and for cases see 44 DIGEST 67–70. As to the nature of easements and miscellaneous easements, see 12 HALSBURY'S LAWS (3rd Edn.) 519, 611; and for cases see 19 DIGEST 7, 174.

Cases referred to:

(1) *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 11 Digest (Repl.) 143, *228*.

(2) *City of London Land Tax Comrs.* v. *Central London Rail. Co.*, [1913] A.C. 364; 82 L.J.Ch. 274; 108 L.T. 690; 77 J.P. 289; 29 T.L.R. 395; 57 Sol. Jo. 403; 11 L.G.R. 693, H.L.; 30 Digest (Repl.) 349, *109*.

(3) *A.-G.* v. *Chambers*, *A.-G.* v. *Rees* (1859), 4 De G. & J. 55; 33 L.T.O.S. 189; 23 J.P. 308; 5 Jur.N.S. 745; 7 W.R. 404; 45 E.R. 22, L.C.; 7 Digest (Repl.) 282, *100*.

(4) *Re Hull and Selby Rail. Co.* (1839), 5 M. & W. 327; 8 L.J.Ex. 260; 44 Digest 68, *492*.

(5) *R.* v. *Lord Yarborough* (1824), 3 B. & C. 91; 2 L.J.O.S.K.B. 196; on appeal sub nom. *Gifford* v. *Lord Yarborough* (1828), 5 Bing. 163; 130 E.R. 1023; sub nom. *R.* v. *Lord Yarborough*, 2 Bli. N.S. 147; 1 Dow. & Cl. 178, H.L.; 44 Digest 67, *485*.

(6) *Dyce* v. *Lady Hay* (1852), 1 Macq. 305, H.L.; 19 Digest 16, *42*.

(7) *A.-G. for Ireland* v. *Vandeleur*, [1907] A.C. 369; 76 L.J.P.C. 89; 97 L.T. 221, H.L.; 44 Digest 75, *562*.

(8) *Phillips* v. *Halliday*, [1891] A.C. 228; 61 L.J.Q.B. 210; 64 L.T. 745; 55 J.P. 741, H.L.; 19 Digest 469, *3215*.

(9) *Rogers* v. *Brooks* (1783), 1 Term Rep. 431, n.; 99 E.R. 1179, n.; 19 Digest 473, *3274*.

(10) *A.-G.* v. *Tomline* (1879), 12 Ch.D. 214; 48 L.J.Ch. 593; 40 L.T. 775; 28 W.R. 76; affirmed (1880), 14 Ch.D. 58; 49 L.J.Ch. 377; 42 L.T. 880; 44 J.P. 617; 28 W.R. 870, C.A.; 44 Digest 79, *606*.

(11) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J.Ch. 68; 35 L.T. 569; 42 J.P. 163; 25 W.R. 165, H.L.; 44 Digest 107, *856*.

(12) *Marshall* v. *Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. 166; 41 L.J.Q.B. 41; 25 L.T. 793; 36 J.P. 583; 20 W.R. 144; 44 Digest 108, *867*.

Also referred to in argument:

A.-G. v. *Portsmouth Corpn.* (1870), unreported, cited in Stuart Moore on The Foreshore (3rd Edn.), p. 555.

A.-G. v. *Portsmouth Corpn.* (1877), 25 W.R. 559; 44 Digest 76, *571*.

Lyell v. *Lord Hothfield*, [1914] 3 K.B. 911; 84 L.J.K.B. 251; 30 T.L.R. 630; 19 Digest 62, *353*.

Richardson v. *Pond* (1860), 81 Mass. (15 Gray) 387.

A.-G. of Straits Settlement v. *Wemyss* (1888), 13 App. Cas. 192; 57 L.J.P. 62; 58 L.T. 358, P.C.; 44 Digest 76, *572*.

Doe d. Seebkristo v. *East India Co.* (1856), 10 Moo.P.C.C. 140; 6 Moo. Ind. App. 267; 14 E.R. 445, P.C.; 44 Digest 69, *499*.

Emmerson v. *Maddison*, [1906] A.C. 569; 75 L.J.P.C. 109; 95 L.T. 568; 22 T.L.R. 748, P.C.; 16 Digest 219, *77*.

R. v. *Pagham Sussex Sewers Comrs.* (1828), 8 B. & C. 355; 2 Man. & Ry.K.B. 468; 108 E.R. 1075; sub nom. *R.* v. *Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338; 44 Digest 81, *625*.

Duke of Beaufort v. *Swansea Corpn.* (1849), 3 Exch. 413; 12 L.T.O.S. 453; 154 E.R. 905; 44 Digest 74, *544*.

Re Belfast Dock Act, 1854, *Ex parte Earl of Ranfurly* (1867), 1 I.R.Eq. 128; 44 Digest 73, *541i*.

Van Diemen's Land Co. v. *Table Cape Marine Board*, [1906] A.C. 92; 75 L.J.P.C. 28; 93 L.T. 709; 54 W.R. 498; 22 T.L.R. 114, P.C.; 44 Digest 73, *535*.

R. v. *Keyn* (1876), 2 Ex.D. 63; 2 Q.B.D. 90; 13 Cox, C.C. 403; sub nom. *R.* v. *Keyn*, *The Franconia*, 46 L.J.M.C. 17; 41 J.P. 517, C.C.R.; 16 Digest 103, *38*.

Plimmer v. *Wellington Corpn.* (1884), 9 App. Cas. 699; 53 L.J.P.C. 105; 51 L.T. 475; 11 Digest (Repl.) 126, **72*.

North Shaw Rail. Co. v. *Pion* (1889), 14 App. Cas. 612; 59 L.J.P.C. 25; 61 L.T. 525, P.C.; 44 Digest 86, *673*.

Foster v. *Wright* (1878), 4 C.P.D. 438; 49 L.J.Q.B. 97; 44 J.P. 7; 25 Digest 14, *109*.

Hindson v. *Ashby*, [1896] 2 Ch. 1; 65 L.J.Ch. 515; 74 L.T. 327; 60 J.P. 484; 45 W.R. 252; 12 T.L.R. 314; 40 Sol. Jo. 417, C.A.; 44 Digest 93, *745*.

A.-G. v. *Hammond* (1575), unreported, cited in Stuart Moore on The Foreshore (3rd Edn.), pp. 219–224.

Ontario Mining Co. v. *Seybold*, [1903] A.C. 73; 72 L.J.P.C. 5; 87 L.T. 449; 19 T.L.R. 48, P.C.; 8 Digest (Repl.) 780, *439*.

Willmott v. *Barber* (1880), 15 Ch.D. 96; 49 L.J.Ch. 792; 43 L.T. 95; 28 W.R. 911; on appeal (1881), 17 Ch.D. 772; 45 L.T. 229, C.A.; 31 Digest (Repl.) 431, *5579*.

Russell v. *Watts* (1883), 25 Ch.D. 559; 50 L.T. 673; 32 W.R. 621, C.A.; reversed (1885), 10 Ch. App. 590; 55 L.J.Ch. 158; 53 L.T. 876; 50 J.P. 68; 34 W.R. 277, H.L.; 19 Digest 40, *215*.

Lord Advocate v. *Wemyss*, [1900] A.C. 48; 34 Digest 619, *174*.

Consolidated Cross-Appeals from a decision of the full court of the Supreme Court of the colony of Southern Nigeria varying orders made by OSBORNE, C.J.

P. O. Lawrence, *K.C.*, *A. R. Pennington*, *K.C.*, and *F. Whinney* for the Attorney-General.

Cave, *K.C.*, *Tomlin*, *K.C.*, and *A. T. Miller* for the respondents (appellants upon the cross-appeals).

Feb. 9, 1915. **LORD SHAW.**—These are two appeals and two cross-appeals, all consolidated, against two judgments pronounced by the full court of the Supreme Court of Northern Nigeria on April 22, 1911, varying the judgment of OSBORNE, C.J., pronounced on Mar. 14, 1910. For the sake of convenience the Attorney-General for Southern Nigeria is hereinafter referred to as "the Crown" and the opposite parties as "the respondents."

The proceedings relate to certain lands in the district of Olowogbowo, in the island of Lagos, which is now a part of the colony of Southern Nigeria. The lands consist of five plots, all of which are situated on the shore of the lagoon. As com-

merce has developed, these lands, and especially the frontage thereof to the sea, have become of considerable value. They adjoin each other; and in the view which is to be taken of these appeals the facts as to the different plots may be sufficiently stated as follows. The respondent firm of Holt & Co. were in occupation claiming as freeholders of (i) William's land and (ii) Dunkley's land, and as tenants of the executors of the Rev. James White, who claimed to be the freeholders of (iii) White's land. The respondents MacIver & Co. were in the occupation of (iv) George's land and (v) Johannsen's land as tenants of the freeholders of these respective plots. The whole premises were occupied for the purpose of the respondents' respective businesses as African merchants.

In regard to the possession and occupancy of the properties, the admitted facts are these: A wharf was built from George's land in or before the year 1859, a pier was built from Johannsen's land prior to the year 1861, and a pier was also built from Dunkley's land soon after that year. The respondents, it is further admitted, built stores, sheds, and other works at different dates upon the land adjoining the waterside, and in particular upon not inconsiderable portions of the solum of the land in question in the case, namely, that which had been foreshore, i.e., land between high and low water marks at ordinary spring tides. The respondents and their predecessors used the foreshore and land for storage and for the purposes of their business; and the wharf and piers already mentioned were also used by them in connection with their trade. While, upon the one hand, there seems little doubt that for about half a century continuous use and possession were had —of the kind and nature just described—and that, as trade developed, additional buildings and erections were put upon the ground, yet, upon the other hand, it is admitted that this use and possession cannot be established for a period of sixty years. To complete the general statement of the facts, it may be mentioned that a retaining wall was built to protect Dunkley's land prior to 1879, and that this retaining wall was continued in front of William's land in the years 1886–8. Further, as was stated on the appeal to the full court, there was no public right of way over the foreshore. In the years 1907 or 1908 the government of the island began the construction of a public road along the waterside of the lagoon. The road was continued over the lands in dispute in the present case. By this means the five plots belonging to the respondents have been cut off from the waters of the lagoon, and from their wharves and piers. By the construction of the road so made some of the stores, buildings and sheds erected by the respondents or their predecessors have been destroyed, and the use and possession of the respondents' lands have been in an important degree subverted. It became, accordingly, necessary to determine the nature of the rights of the parties so as to settle the basis upon which compensation shall be made.

The form of the proceedings is by way of information. It only requires to look at the prayer of these to observe the startling consequences which would result to all the respondents' properties should that prayer be granted as it stands. For it is prayed that a declaration be made of the absolute right of the Crown in the land in dispute, and for an injunction and peaceable possession. The result of this would be the complete extrusion of the respondents from land, foreshore, wharves, and piers. The properties themselves, instead of being properties abutting on the sea, would be separated therefrom by the road to be constructed, and be converted into hinterland. Their Lordships are not surprised that the advisers of the Crown shrank from the consequences of this sweeping demand. The only substantial concession made, however, was that as to Dunkley's land and Johannsen's land, no appeal was presented against that portion of the judgment of the court below which declared that the respondents have acquired an easement for a jetty and a right of way thereto from these respective lands. Subject to this, the demand of the Crown is maintained in all its breadth. This is the first time that process by way of information has been used in Southern Nigeria, and it is remarked by OSBORNE, C.J., that:

"It has proved exceedingly difficult to adapt to the Supreme Court Ordinance and the procedure rules thereunder, which are framed to meet the requirements of a community wherein illiterate suitors not uncommonly conduct their own litigation."

Strict English procedure was accordingly departed from, and the courts went further in considering themselves not limited by the actual wording of the informations and pleadings. This occurred with the consent of both parties. OSBORNE, C.J., said:

"What we are really asked to do is to ascertain and declare what have been the rights of the respective parties from the time of first occupation of their lands by their predecessors in title, not only with regard to foreshore, but with regard also to a strip of land which lies between the limits specified in the various grants relating to the defendants' lands and the low-water mark of the lagoon."

While it is true that this state of the record may import certain difficulties into the case, their Lordships pass no adverse comment upon the course taken by the parties and the courts below. And they desire to express their sense of the thoroughness and care with which the perplexing problems which emerge in the case, both upon the law and in fact, have been treated by all of the learned judges.

It appears from the historical narrative in the judgment of OSBORNE, C.J., that, about 1850, Lagos, then under powerful chiefs, was one of the principal centres of the slave trade. It was bombarded in 1851 by a British force, and on Jan. 1, 1852, the slave trade was finally abolished. A British consulate was established, and there was an influx of many liberated slaves from Sierra Leone and elsewhere. There seems no reason to doubt the opinion of the learned Chief Justice that the land had originally belonged to tribal communities, but that "during the decade between 1852 and 1862 the practice of alienation sprang into vogue, and another new feature, totally foreign to native law, which knew not writing, was introduced in the shape of written grants by the King of Lagos. The land in Lagos was originally attached to the stools of the White Cap chiefs, who were in no way subordinate to the early kings." In the course of time, however, the royal power increased and the tribal and chieftain power diminished. This was the state of matters when King Docemo and his chiefs, on Mar. 6, 1861, entered into a treaty of cession of the port and island of Lagos to Her Majesty the Queen of Great Britain. The treaty is printed at length in the record in this case. The only question which has been mooted upon it is whether by its terms it granted sovereignty and jurisdiction alone to the exclusion of property. The words are complete and absolute, they

"grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and island of Lagos, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island and premises, with all the royalties thereof, freely, fully, entirely, and absolutely."

Their Lordships do not refer to the treaty further than to say that, in their opinion, property was not excluded from the grant; and they think also that this is subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected. It may be that these required confirmation by subsequent procedure, prescribed by way of ordinance or otherwise, but no question on that head arises in the present case. On Mar. 13, 1862, the ceded territories, under the title of Settlement of Lagos, were erected into a separate government. On Feb. 19, 1866, Lagos became part of the West African Settlements. On July 24, 1874, the Gold Coast Colony, including Lagos, was formed. On Jan. 13, 1886, Lagos again became a separate colony, and finally, on May 1, 1906, it became the colony of

Southern Nigeria. This is briefly the political history of the island, but none of these changes, recorded in the judgments of the court below, effected any alteration in the status of occupants of land, or in the nature of the tenure thereof.

With regard to the plots of land in question in the present case, the one point which has a really important bearing upon the questions to be determined in the appeals is as to the boundary seaward of those plots. On Jan. 21, 1864, a Crown grant was executed in favour of Williams, who had been in possession for twelve years before, and the boundary on the south-west side of the property was stated to be the river Lagos. In 1861 there had been a grant of the next plot by King Docemo to a native called Captain Harry Johnson; Johnson sold to Dunkley, and in 1869 Dunkley obtained a Crown grant. There is a peculiarity as to the southern boundary, which is stated to be the "Marina," but it appears to be a fact that there was no "Marina" or public thoroughfare in that island, and, as the Chief Justice states, there is evidence that Dunkley himself had previously reclaimed some land and built a sea wall thereon as early as 1868, and that at the time he acquired the Crown grant he had a jetty or pier opposite his land. As to the third plot, the original grant was to the Rev. James White, in 1861, and in his Crown grant the western boundary is stated to be the lagoon. The fourth plot—viz., George's land—was the subject of a grant from King Docemo, and the boundary is described as "facing the lagoon." The fifth plot—viz., Johannsen's land—is described as having a water frontage, and in an earlier agreement the property is said to include the ground on the beach. Their Lordships do not investigate these titles in further detail. For, in their opinion, they are substantially at one in this, that the properties were each and all treated in description as being bounded in fact by the sea. The expression may be in one case the river Lagos, in another the lagoon, and so on, but a sea frontage was that which was meant, and in their Lordships' opinion was sufficiently expressed. They were riparian properties. In the next place, in their Lordships' view, there was no express grant of foreshore made in any one of these titles, nor can any grant of foreshore be implied, looking to the language of description which is employed. Their Lordships are not moved by the fact that in some cases measurements are given; these would have to yield to the description. But the description itself is a water lagoon or sea boundary, and, as stated, this, in the opinion of the Board, does not embrace foreshore within the scope of the grant.

Before adverting to the state of possession of these properties, their Lordships think it right to allude to one fact with regard to the sea frontage. A swift current sweeps along the shore. The effect in the past has been to erode the coast, and it has been the practice in time past memory to erect upon the shore stakes or "cabbage posts" to prevent the serious inroad and ravages of this tidal erosion. The practice was not only known to the British government, but so early as 1864 it was recognised, and, indeed, enforced, by an ordinance confirmed upon Mar. 28 of that year. A road had been made along a part of the riverside, and the owners of land abutting on the road were ordained, among other things, to drive in stakes in the bank of the river in such a manner as should be required by the government surveyor, the narrative of the ordinance being that the road was liable to be put out of repair and the soil carried away by inter alia "the action of the tide at the base thereof." The reason of the ordinance is stated to be the convenience and comfort of Her Majesty's subjects. There can, in the opinion of the Board, be little doubt that the erosive action of the sea was such along the coast of Lagos that a protection against it was considered not only to be for private but for public advantage.

Before stating the nature of the operations conducted by the respondents, their Lordships, in view of the argument presented to them, think it necessary to consider the possession of the properties, the descriptions whereof have been already alluded to, in reference to the doctrine of the accretion from the sea. In the first place their Lordships are of opinion that when de facto the boundary was the sea under the different names already alluded to, there is nothing in the law or the

nature of the case to prevent the application of the ordinary doctrine of accretion or dereliction to such a condition of things. On the one hand, if erosion had continued, their Lordships do not doubt that it would have been no defence against the claim of the Crown that the foreshore upon the line of inroad had de facto been transferred to the Crown as owners of the sea and its bed within territorial limits, and of foreshore, even although the line of the eroded foreshore had made considerable invasion into the measured plots of lands, as these were described in the titles. Upon the other hand, if accretions had been formed in the course of nature by the silting up of sand, gravel and the like, and these accretions had been of the gradual character to be afterwards referred to, they would have been added to the land, notwithstanding the measurement in square yards or feet which the title contained. The reason of this is not far to seek, and it is substantially to be found in that general convenience and security which lie at the root of the entire doctrine of accretion. To suppose that lands which, although of specific measurement in the title deeds, were de facto fronted and bounded by the sea, were to be in the situation that their frontage to the sea was to disappear by the action of nature to the effect of setting up a stretch of land, it might be yards, feet, or inches, between the receded foreshore and the actual measured boundary of the adjoining lands, which strip was to be the property of the Crown, and was to have the effect of converting land so held into hinterland, would be followed by grotesque and wellnigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage.

The whole of this question as applicable to lands de facto fronting a river but described by measurements which excluded its bed, was anxiously discussed in *City of London Land Tax Comrs.* v. *Central London Rail. Co.* (2). The law with reference to river and street boundaries of property was there gathered together, and it need no longer be a matter of doubt that the operation of adding to the ownership of riparian lands the property of the soil ad medium filum is not interfered with on account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation, or colouring do not in fact include any part of the bed of the river or of the street. Similarly, in their Lordships' opinion properties scheduled or specifically measured, but in fact abutting on the seashore are not excluded from the operation of the rule which adds to riparian lands the increment which is caused by natural and gradual accretion from the sea. In the present case, accordingly, the conveyances of the properties which are in question in this appeal were in the opinion of the Board habile to cover the land formed by slow, gradual, and natural accretion.

Although various points were brought before their Lordships in the direction of questioning the law of accretion, their Lordships, for the reasons stated, do not doubt its general applicability to lands like those of the respondents' abutting on the foreshore. Nor do they, however, doubt the one condition of the operation of the rule. That is that the accretion should be natural, and should be slow and gradual—so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs. There has been much written and decided law upon this subject, and notwithstanding the very full argument, it need not be entered upon at large. But in spite of the wealth of authority, including the dicta of Hale's De Jure Maris and of many eminent judges, it is not clear that the general proposition has been advanced beyond that laid down by Justinian in his Institutes, bk. 2, tit. 1, s. 20:

> "Præterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intellegere non possis, quantum quoquo momento temporis adjiciatur."

Blackstone Commentaries (vol. 2, chap. 16, p. 261), says:

> "As to lands gained from the sea, either by alluvion, by the washing up of

sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little by little, by small and imperceptible degrees, it shall go to the owner of the land adjoining."

BLACKSTONE then introduces by way of explanation a reference to a doubtful brocard de minimis non curat lex, which LORD CHELMSFORD in *A.-G.* v. *Chambers* (3) (4 De G. & J. at p. 66) properly disclaims. The true reason for the principle of law in regard to foreshores is the same reason as the principle in regard to river banks, i.e., that it is founded upon security and general convenience.

In *Re Hull and Selby Rail. Co.* (4) LORD ABINGER, C.B., referring to *Lord Yarborough's Case* (5), said:

"The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property."

Re Hull and Selby Rail. Co. (4) is important not only for the opinions of LORD ABINGER and ALDERSON, B., but for the fact of its acceptance of this principle of the law (settled as between subject and subject) to the relations between the subject and the Crown. LORD ABINGER said (5 M. & W. at p. 332):

"In all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added; and vice versa."

He repeats in different words his main proposition:

"No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property."

ALDERSON, B., dwelt specially upon the double-sided operation of the rule. He said (ibid., at pp. 332, 333):

"I think the question is precisely the same, whether the claim is made against the Crown or the Crown's grantee. Suppose the Crown, being the owner of the foreshore—that is, the space between high and low water-mark—grants the adjoining soil to an individual, and the water gradually recedes from the foreshore, no intermediate period of the change being perceptible, in that case the right of the grantee of the Crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the Crown would be the gainer of the land. The principle laid down by LORD HALE, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question."

In *A.-G.* v. *Chambers* (3), LORD CHELMSFORD refers to the double-sided operation of the rule in this way (4 De G. & J. at p. 68):

"It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore."

As to the nature of the accretion, it must be, as already mentioned, so gradual as in a practical sense to be imperceptible in its progress. In *R.* v. *Lord Yarborough* (5), ABBOTT, C.J., said (3 B. & C. at p. 107):

"Considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time."

This statement of the principle—namely, that the accretion is to be something which is imperceptible in the sense of not being observed in its actual progress—goes no further than the words of JUSTINIAN already quoted.

It was strongly contended before the Board that the facts of this case showed it to be substantially one of natural accretion. The argument was this. In accordance with the policy generally approved, stakes were set out between high and low-water mark, and the silting up took place within those stakes and between them and the actual shore, and, secondly, any artificial erections were merely for the purpose of levelling the ground so as to make it suitable for the landing of cargoes and avoiding the erosive action of the sea. The view thus presented certainly does receive no inconsiderable justification from language employed in the judgments of the court below. More than one reference is made to "the question of the reclaimed or silted-up land," and no distinction appears to be clearly drawn between the one and the other. Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible in the sense already described, becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore, thus suddenly altered by reclamatory work upon it, remains as before—i.e., in cases like the present, with the Crown. The history of the foreshore adjoining these lands, and of the operations thereon, produces one of the main difficulties of the present case. Their Lordships have come to the conclusion that they are confronted with substantially concurrent judgments of the courts below upon this question of fact. Upon the appeals, GRIFFITH, C.J., after referring to the finding of the trial judge, said:

> "I have no reasonable doubt that the great bulk of the land between the Crown grant land and the lagoon is the result of artificial reclamation on the part of the defendants and their predecessors."

OSBORNE, C.J., who had been the trial judge, put his judgment upon this point thus:

> "The evidence seems clearly to show that actual reclamation contributed more than alluvion to the extension of the lands in the occupation of the defendants and their predecessors in title, and as to actual gain by alluvion, uninfluenced by the defendants' and their predecessors' reclaiming operations, there is no direct evidence."

The finding is thus not very specific, although WINKFIELD, J., goes the length of saying:

> "It is not established that any part of the land neutral tint on the plan was the result of natural accretion or alluvion."

In this state of the judgment their Lordships are not in a position to hold themselves free to decline to accept the finding. Nor do they say that they would have come to a different conclusion. The case, accordingly, must be dealt with as substantially one of an addition to adjoining lands being caused artificially by the execution of reclamatory work.

The natural situation of the land was that, consequent upon the erosion mentioned, a relatively steep and inconvenient shore had been created. The reclamation mentioned undertaken by the respondents and their predecessors was not of the simple character of the erection of stakes, as alluded to, but was the building of a solid wall; and the evidence appears to point to the foundations of that wall having been sunk to the extent of at least a few feet in the soil between ordinary high and low-water mark—i.e., in the foreshore itself. Nothing more natural could have been expected, and probably nothing more in the interest of all parties, including the Crown. The fact, however, being accepted as stated, the legal consequences follows—viz., that the doctrine of natural accretion cannot be held to apply. The wall, having been founded as stated, was built up; the land within it and the old high line of foreshore was levelled; and the respondents and their predecessors have possessed the same ever since, that is, during a very long course of time, and they built thereupon from time to time the warehouses and sheds which appear upon the plans. The ground upon which these are erected protrudes

largely over the disputed territory. Upon the new wall frontage itself wharfage accommodation was constructed; and the whole—viz., piers, wharves, disputed land and property within the old boundaries have been possessed together and used, roughly speaking, in this way for a period of between thirty and fifty years.

The judgment of the full court has affirmed various easements over reclaimed land (i) in the case of Williams's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (ii) and (iii) in the case of Johannsen's and Dunkley's lands easements for jetties. Against these last the Crown has not insisted at their Lordships' Board, but with regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof.

Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce* v. *Hay* (6), by LORD ST. LEONARDS, L.C., who observed (1 Macq. at p. 312):

> "The category of servitude and easements must alter and expand with the changes that take place in the circumstances of mankind."

But in their Lordships' opinion the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion, and it is not to be wondered at that not only they, but all parties on the island, appear to have considered these operations, which were clearly beneficial to the general interests, in no way to be of the nature of wilful appropriation or of trespass, but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

There remains for consideration the judgment of OSBORNE, C.J., which was inter alia defended in argument by the respondents, and to which it was part of their case that this Board should revert. The respondents are not in a position to plead the benefit of prescription as, although their buildings and erections have been used and occupied for a time unquestionably long, it has, as already mentioned, not reached the requisite period of sixty years. Their Lordships have been referred, on the other hand, to cases like the *A.-G. for Ireland* v. *Vandeleur* (7). But the facts of the present case cannot be subsumed under the category of lost grant. Although their Lordships are accordingly impressed with the long-continued possession, they are unable to discover in the law of England any acknowledged ground for holding that the property of the solum of the artificially reclaimed land has thereby become vested in the respondents.

A reference also was made to *Phillips* v. *Halliday* (8). But the circumstances of that case were remote from the present. What was decided was that a pew may be annexed to a dwelling house within a parish "either by a faculty or by prescription, which supposes a faculty," and that a faculty may be presumed upon evidence of exclusive possession and repair for a long period. A passage in the judgment from the opinion of HERSCHELL, L.C., is much relied upon. It is to the following effect ([1891] A.C. at p. 234):

"In the case of *Rogers* v. *Brooks* (9), WILLES, J., a very learned judge, said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. No doubt that is a strong expression, and possibly there may be presumptions that ought not to be made even under such circumstances as those, but I think it points out how emphatically the view has been entertained by learned judges that where there has been long continued possession which is consistent with a legal title, every reasonable presumption ought to be made in order to support the possession and maintain it as having been of right."

In the opinion of the Board this passage does not support the proposition that a transfer of the dominium of lands can be effected without the presumption of a lost grant, or without possession during the full requisite period of prescription. But the case does bear upon a question of maintenance of possession considered apart from declaration of ownership. The effect of this upon the present case will be immediately seen.

As to the facts, the dates of reclamation have already been given and the nature of the erections, operations, and occupation stated. To all intents and purposes the reclaimed ground was used along with and as part and portion of the respondents' properties as a whole; and the piers, wharves, and whole land have been for the protracted period alluded to, used for the purpose of the shipping and mercantile business. Their Lordships are further of opinion that the circumstances in which the reclamation itself was made negative all ideas of intentional trespass or of surreptitious acquisition of land. As stated, the respondents' and their predecessors' acts of reclamation were good for all concerned, and were a public benefit. Their Lordships find themselves in agreement with OSBORNE, C.J., who tried the cause, and has submitted both facts and law to a thorough consideration, that "it is quite impossible to believe that all the reclamation and subsequent building can have gone on without the knowledge and against the wish of the government . . . as the government must have been aware of the reclamation and subsequent building, it is more probable that those acts were done with permission from the governor for the time being than that they were acts of trespass done in defiance of the government."

It remains accordingly for the Board to consider, under such circumstances, whether it is now the right of the Crown to subvert this long-continued occupation and to obtain an injunction which would extrude the respondents from the reclaimed land. One result of no inconsiderable consequence would, of course, follow. The plots of land, all of which were bounded by the foreshore and the sea, would be converted into inland properties, and the result of artificial reclamation upon the foreshore forty years ago, a reclamation as above described, not objected to, and followed by occupation ever since, would be the loss of all kinds of navigation, groundage, and other foreshore rights, and the destruction of probably the most serious elements of value in the whole of the respondents' properties. Their Lordships are of opinion that this result is not in accordance with law. It may be that in building the foundation of the wall a stricter care should have been taken to keep on the landward side of the foreshore; but the foreshore, it should not be forgotten, was exceptionally troublesome; the erosion was going on, and the current was so dangerous that in native opinion there was a devil in the water. In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it should not be forgotten that it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown. This principle is in accord with the law laid down in *A.-G.* v. *Tomline* (10), and prin-

A cipally with the opinions of FRY, J., at the trial, and COTTON, L.J., in the Court of Appeal. With regard to the use and enjoyment of the made-up land by the respondents as merchants, their Lordships are, as already indicated, of opinion that the same cannot, in the circumstances, be subverted. As to what may be called foreshore rights, as such, the point of the case seems to be: What is the effect of a frontage owner reclaiming part of a foreshore which is vested in another. B It appears from *Lyon* v. *Fishmongers' Co.* (11) that the frontage owner has foreshore rights annexed to his land, beyond such rights as he possesses as one of the public. And the real question, therefore, is whether the reclamation made in the circumstances before described operates as an abandonment of these rights over the land reclaimed. The abandonment of rights annexed to land is a question of intention, and it is absurd to suppose that the frontagers in the present case in- C tended to convert their holdings into what has been described as "hinterland." Further, it appears from *Marshall* v. *Ulleswater Steam Navigation Co.* (12) that the reclamation of foreshore by the Crown or a third party would have no effect on the riparian rights of the frontagers, so that the frontagers' rights may exist even after the land has ceased to be subject to the flow and re-flow of the tide.

The case has been brought in order to determine the principles upon which D compensation shall be awarded to the respondents in consequence of the construction by the Crown of a road over the disputed land. Their Lordships desire to make it clear that it follows from their decision that the foreshore rights originally attaching to the respondents' lands before reclamation have, accordingly, not been destroyed thereby. The lands further will fall, upon the case of compensation, to be treated upon the principle laid down in the *Duke of Buccleuch* E v. *Metropolitan Board of Works* (1), as possessing not only rights of navigation and otherwise in and enjoyable by the public at large, but those special rights which are attached and add value to specific riparian lands. Their Lordships will humbly advise His Majesty that the judgment of the full court should be set aside and the judgment of the Chief Justice in the court of first instance on Mar. 14, 1910, restored, except upon the point of costs. The Crown will pay F to the respondents the costs of the appeals and of the causes in the courts below.

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[*Reported by* W. E. REID, ESQ., *Barrister-at-Law*.]

A

WHITTAKER *v.* LONDON COUNTY COUNCIL

[KING'S BENCH DIVISION (A. T. Lawrence, and Bailhache, JJ.), May 4, 1915]

[Reported [1915] 2 K.B. 676; 84 L.J.K.B. 1446; 113 L.T. 544; 79 J.P. 437; 31 T.L.R. 412; 13 L.G.R. 950]

B

Tramway—Offence—Passenger travelling beyond distance to which ticket entitled him to travel—Right of conductor to eject him from tramcar—Wrongful ejection—Liability of tramway owners—Tramways Act, 1870 (33 & 34 *Vict.*, *c.* 78), *s.* 51, *s.* 52.

C

The plaintiff, who had paid his fare, was ejected from one of the defendants' tramcars by the conductor who mistakenly believed that he was attempting to travel beyond the distance to which his ticket entitled him to travel. He claimed damages from the defendants in respect of injuries which he had sustained through being ejected.

D

Held: the remedies possessed by tramway authorities, such as the defendants, against a person who entered a tramcar and refused to pay the proper fare were not limited to those provided by s. 52 of the Tramways Act, 1870, but included the common law right of ejection, provided that no more force than might be necessary was used; here, the conductor had committed a wrongful act in the course of his employment as a servant of the defendants who were, accordingly, liable.

E

Notes. As to the liabilities of tramway authorities, see 32 HALSBURY'S LAWS (2nd Edn.) 728–730; and for cases see 43 DIGEST 351–353. For the Tramways Act, 1870, s. 51 and s. 52, see 25 HALSBURY'S STATUTES (2nd Edn.) 1318.

Cases referred to:

(1) *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C.B.N.S. 336; 28 L.J.C.P. 242; 33 L.T.O.S. 366; 5 Jur.N.S. 1104; 7 W.R. 464; 141 E.R. 486; 10 Digest (Repl.) 1207, *8436.*

F

(2) *Hutchins* v. *L.C.C.*, July 30, 1914, unreported, C.A.; reversed (1915) 85 L.J.K.B. 1177; 114 L.T. 377; 80 J.P. 193; 32 T.L.R. 179; 60 Sol. Jo. 156; 14 L.G.R. 313, H.L.; 8 Digest (Repl.) 125, *805.*

(3) *Poulton* v. *London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 8 Digest (Repl.) 127, *812.*

G

Also referred to in argument:

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 34 Digest 129, *987.*

Bayley v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1872), L.R. 7 C.P. 415; 41 L.J.C.P. 278; 28 L.T. 366; affirmed (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 366, Ex. Ch.; 8 Digest (Repl.) 124, *801.*

H

Farry v. *Great Northern Rail. Co.*, [1898] 2 I.R. 352; 34 Digest 135, *a.*

Dyer v. *Munday*, [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306, C.A.; 34 Digest 130, *996.*

Lloyd v. *Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 28 T.L.R. 547; 56 Sol. Jo. 723, H.L.; 34 Digest 129, *991.*

Charleston v. *London Tramways Co.* (1888), 4 T.L.R. 629; 32 Sol. Jo. 557, C.A.; 8 Digest (Repl.) 127, *816.*

I

Myers v. *Bradford Corpn.*, [1915] 1 K.B. 417; 84 L.J.K.B. 306; 112 L.T. 206; 79 J.P. 130; 31 T.L.R. 44; 59 Sol. Jo. 57; 13 L.G.R. 1; affirmed sub nom. *Bradford Corpn.* v. *Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 32 T.L.R. 113; 60 Sol. Jo. 74; 14 L.G.R. 130, H.L.; 38 Digest (Repl.) 120, *829.*

Lyles v. *Southend-on-Sea Corpn.*, [1905] 2 K.B. 1; 74 L.J.K.B. 484; 92 L.T. 586; 69 J.P. 193; 21 T.L.R. 389; 3 L.G.R. 691, C.A.; 38 Digest (Repl.) 108, *759.*

Appeal from Wandsworth County Court.

The plaintiff, F. Whittaker, a bricklayer's foreman, had been working at Barnes on Sept. 4, 1914, and was returning home. At Wandsworth High Street he boarded a tramcar belonging to the defendants, the tramway authority for the district, and duly paid his fare. Before he had reached his destination, the conductor, mistakenly believing that he was attempting to travel beyond the distance to which his ticket entitled him to travel, ejected him from the tramcar with such force that he fell into the road and sustained injuries to his ankle. He brought an action against the defendants for damages for assault by their servant, the conductor. At the trial in the county court the jury, in answer to certain questions found that the plaintiff was ejected from the car on the ground that the conductor thought that he was endeavouring to travel to a point beyond which his ticket allowed him to travel but that he was not ejected through the malice or spite of the conductor; that the conductor did not think that the plaintiff was intoxicated; and that the injuries he suffered were the result of his being ejected. They assessed the damages at £30. The county court judge entered judgment for the defendants on the ground that the conductor was not acting within the scope of his authority in assaulting the plaintiff and ejecting him from the car. The plaintiff appealed.

The Tramways Act, 1870, provides:

"51. If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects on arriving at the point to which he has paid his fare to quit such carriage, every such person shall, for every such offence, be liable to a penalty not exceeding forty shillings."

"52. It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing or attempting to commit any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he is otherwise discharged by due course of law."

McCall, K.C., and *Martin O'Connor* for the plaintiff.

Craig Henderson for the defendants.

A. T. LAWRENCE, J., stated the facts, and continued: It seems to me, under these circumstances, that this is not a case in which it is correct to say, as was contended for the defendants, that the defendants, as the tramway authority, had no power themselves to eject the plaintiff from the tramcar, and, therefore, could not delegate such power to their servant the conductor. In my opinion, although the conductor acted in a manner that was contrary to what the defendants intended, it was not legally impossible for the defendants to eject a passenger or for them to have delegated to their servant, the conductor, the authority to do it. The case comes within the first of the three classes of cases mentioned by WILLES, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1) where he says (6 C.B.N.S. at p. 356):

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue that or the statutory remedy."

The defendants, as the tramway authority, have a right of property in their cars, and, in my opinion, a right to protect them against trespassers; consequently they can eject from their cars as a trespasser any person who attempts to remain therein without paying, or intending to pay, his fare. The fact that a person has entered a tramcar does not protect him from the common law liability to be treated as a trespasser if he is one as a matter of fact. I agree that the defendants have other remedies given to them by the Tramways Act, 1870, and their by-laws, but these remedies are not exclusive of their common law right to protect their property.

In my opinion, therefore, the question left open by KENNEDY, L.J., in *Hutchins* v. *L.C.C.* (2) in the Court of Appeal must be answered by saying that a tramway authority can eject a trespasser in a case such as this from one of their cars. To decide the question otherwise would place the tramway authorities in a ridiculous position, as they would be unable to protect their own property. In this case, the conductor committed a wrongful act in the course of his employment as a servant of the defendants; the plaintiff was consequently entitled to sue the defendants, and judgment ought to have been entered in his favour in accordance with the findings of the jury. The appeal must, therefore, be allowed.

BAILHACHE, J.—I am of the same opinion, and I only desire to say a few words. It appears that the conductor ejected the plaintiff from the tramcar, causing him some injury, because he mistakenly thought that the plaintiff was attempting to travel beyond the point to which his ticket entitled him to travel. There can be no doubt that, if the defendants were not a statutory body with powers limited by statute, such an action on the part of such a servant would be an action within the scope of his authority for which the master would be liable.

It is contended for the defendants, however, that they are not liable because a tramway authority is a statutory body with limited powers, and cannot delegate to its servants powers which it does not itself possess. *Poulton* v. *London and South Western Rail. Co.* (3) was referred to as supporting that proposition. I have no doubt that that is the law with regard to statutory bodies, including building societies and limited companies whose powers are limited and defined by their memorandum and articles of association; it certainly has been laid down as the law with regard to tramway companies. So far I agree with the argument of counsel on behalf of the defendants. He then referred us to s. 51 and s. 52 of the Tramways Act, 1870, and contended that the powers possessed by a tramway authority in a case of this sort were confined to the powers given by those sections. I do not think that that is so. Section 51 makes the act which the plaintiff was mistakenly suspected of committing an offence punishable by a penalty not exceeding 40s., and s. 52 provides that, when a tramway authority wishes to treat such an act as an offence, any officer or servant of the tramway authority may seize and detain any person discovered committing or attempting to commit the act, whose name or residence is unknown, until such person can conveniently be taken before a justice, or until he be otherwise discharged by due course of law. In my opinion, however, the detention provided for by that section is not the only remedy possessed by a tramway authority; it is, I think, in addition to the other remedies which an authority would have if this section was not included in the Act. One of the most obvious remedies which an authority must ex necessitate have is the common law right to treat as a trespasser any person who insists on remaining on a tramcar without paying his fare, and a trespasser may be ejected provided no more force than may be necessary is used. The defendants, as the tramway authority, have a perfect right to do that, and I do not think that s. 52 deprives them of that right, or that they are bound to take the trespasser's name and address. In my opinion, therefore, the learned county court judge was wrong, and this appeal must be allowed.

Solicitors: *Yardley, Tilley & Co.*; *Edward Tanner.* *Appeal allowed.*

[*Reported by* L. H. BARNES, ESQ., *Barrister-at-Law.*]

A

Re BRITISH RED CROSS BALKAN FUND. BRITISH RED CROSS SOCIETY *v.* JOHNSON

[CHANCERY DIVISION (Astbury, J.), July 16, 1914]

B [Reported [1914] 2 Ch. 419; 84 L.J.Ch. 79; 111 L.T. 1069; 30 T.L.R. 662; 58 Sol. Jo. 755]

Trust—Resulting trust—Subscriptions for special object—Unapplied surplus of fund subscribed—Resulting trust for subscribers—Distribution of surplus.

A special fund was raised by subscription to aid the wounded in the Balkan war of 1912. At the end of the war, the fund having been duly applied during C the war, an unapplied surplus remained which became distributable to some or all of the subscribers by way of resulting trust.

Held: the rule in *Clayton's Case* (1) had no application, and the balance belonged to the subscribers in the proportion which the total amount unexpended bore to the total fund subscribed.

D **Notes.** Explained and Distinguished: *Re Welsh Hospital (Netley) Fund, Thomas* v. *A.-G.*, [1921] All E.R.Rep. 170. Applied: *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1945] 2 All E.R. 711. Distinguished: *Re Hillier, Hillier* v. *A.-G.*, [1953] 2 All E.R. 1547.

As to resulting trusts, see 33 HALSBURY'S LAWS (2nd Edn.) 141 et seq.; and for cases see 43 DIGEST 642 et seq.

E Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, *370*.

(2) *Cory Bros. & Co.* v. *Mecca, Turkish Steamship (Owners), The Mecca*, [1897] A.C. 286; 66 L.J.P. 86; 76 L.T. 579; 45 W.R. 667; 13 T.L.R. 339; 8 Asp.M.L.C. 266, H.L.; 12 Digest (Repl.) 540, *4098*.

F Also referred to in argument:

Deeley v. *Lloyds Bank, Ltd.*, [1912] A.C. 756; 81 L.J.Ch. 697; 107 L.T. 465; 29 T.L.R. 1; 56 Sol. Jo. 734, H.L.; 12 Digest (Repl.) 552, *4191*.

Re Abbott Fund Trusts, Smith v. *Abbott* [1900] 2 Ch. 326; 69 L.J.Ch. 539; 48 W.R. 541; 8 Digest (Repl.) 447, *1414*.

G **Originating Summons.**

As a result of appeals made by the plaintiffs to the public in October, 1912, inviting subscriptions for a special fund, to be called the British Red Cross Balkan Fund, to enable the plaintiffs to dispatch expeditions to aid the wounded in the war in the Balkans between the Balkan Allies and Turkey, large sums amounting to £28,682 were subscribed from time to time during the war. This war ended H sooner than was expected, with the result that, in July, 1913, the plaintiffs were in possession of an unexpended balance of £12,655 19s. 6d., which admittedly belonged to some or all of the subscribers by way of resulting trust. The plaintiffs sent out a circular letter, dated July 5, 1913, to all subscribers stating that the war was concluded and that an unexpended balance of the funds subscribed was in their possession, and asking them to consent to such balance being applied I for the general purposes of the plaintiffs. To this letter, 923 subscribers of £5,108 sent no reply, 21 subscribers of £295 intimated that they wished their money returned, and the remainder, 2,310 subscribers of £23,279, consented to such an application of their subscriptions. The accounts of the expenditure on the war showed that the amount actually subscribed up to Nov. 8, 1912, was the exact amount actually expended in aiding the wounded in the war.

The question arose whether the rule in *Clayton's Case* (1) was applicable under these circumstances; if so, the balance in hand must be treated as derived from subscriptions coming in on or after Nov. 8, 1912, and would belong to the sub-

scribers who had subscribed on or after that date, so that they would be entitled to receive their subscriptions back in full. If, on the other hand, the rule in *Clayton's Case* (1) was not applicable, the expenditure would be treated as made rateably out of all the subscriptions irrespective of their date, and the unexpended balance would belong to all the subscribers rateably in proportion to their subscriptions.

The plaintiffs issued this summons to ascertain how the unexpended balance of the funds should be applied by them.

Howard Wright for the plaintiffs.

Roger Turnbull for subscribers who had subscribed before Nov. 8, 1912.

H. O. Danckwerts for those of the subscribers who had subscribed on or after Nov. 8, 1912.

ASTBURY, J.—The question which arises here is whether, there being a balance in the hands of the trustees of the plaintiffs, the portion of such balance of unexpended subscriptions must be returned to subscribers according to the analogy of the rule in *Clayton's Case* (1), or whether it must be returned to them after arriving at the proportion the unexpended balance bears to the total subscriptions.

The rule in *Clayton's Case* (1) as re-stated by LORD HALSBURY, L.C., in *The Mecca* (2) ([1897] A.C. at p. 290) is that

> "where an account current is kept between parties as a banking account, 'there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other.' "

This is not a rule of law, but merely a rule of evidence, and the circumstances of any particular case may or may not afford ground for inferring that the transactions of the parties were not intended to come under the general rule.

In my judgment, the rule in *Clayton's Case* (1) is obviously inapplicable to the present case. After the Balkan War broke out, application was made by the plaintiffs to the public for subscriptions for a special fund for assisting the sick and wounded. Subscriptions were obtained and duly applied, and, at the close of the war, there was an unexpended balance of £12,655 19s. 6d. That balance, or so much of it as is returnable to subscribers who are unwilling to allow it to be used for the general purposes of the fund, must be returned to subscribers in the proportion which the total amount unexpended on the purposes for which subscriptions were made bear to the total fund subscribed.

Solicitors: *Freshfields.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

BROWN *v.* JOHN WATSON, LTD.

[House of Lords (Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Shaw and Lord Parmoor), March 30, 31, April 28, 1914]

B [Reported [1915] A.C. 1; 83 L.J.P.C. 307; 111 L.T. 347; 30 T.L.R. 501; 58 Sol. Jo. 533; 7 B.W.C.C. 259]

Workmen's Compensation—"Arising out of and in course of employment"—"Accident"—Miner—Chill while waiting to ascend mine—Death from pneumonia—Need to prove physical impact—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1 (1).

C In consequence of an accident to one of the shafts, the men in a pit where the workman was employed were ordered to ascend to the surface by another shaft, at the bottom of which they waited for about an hour and a half. During this period a strong current of cold air blew on the men. On reaching the surface B. complained of feeling cold and died soon after from pneumonia due to the chill incurred while waiting.

D **Held:** physical impact was not a necessary element to found a claim for compensation under the Workmen's Compensation Act, 1906, and the workman's death was caused by an accident arising out of and in the course of his employment, and his dependants were entitled to compensation.

Decision of the Second Division of the Court of Session in Scotland, 1913 S.C. 593, reversed.

E **Notes.** The Workmen's Compensation Act, 1906, was repealed by the Workmen's Compensation Act, 1925, s. 89, Sched. 9. The principle of "arising out of and in the course of employment," is now contained in s. 7 (4) of the National Insurance (Industrial Injuries) Act, 1946 (16 Halsbury's Statutes (2nd Edn.) 814) with the variation that an accident arising in the course of an insured person's employment must be deemed, in the absence of evidence to the contrary, also to F have arisen out of that employment.

Considered: *Barbeary* v. *Chugg* (1914), 84 L.J.K.B. 504; *Glasgow Coal Co.* v. *Welsh*, [1916] 2 A.C. 1; *Innes* (*or Grant*) v. *Kynoch*, [1919] A.C. 765; *Walker* v. *Bairds and Dalmellington, Ltd.* (1935), 153 L.T. 322; *Smith* v. *Cornhill Insurance Co.*, [1938] 3 All E.R. 145. Referred to *Aitken* v. *Finlayson, Bousfield & Co.* (1914), 7 B.W.C.C. 918; *Thom* (*or Simpson*) v. *Sinclair*, [1916–17] All E.R. G Rep. 415; *Raeburn* v. *Lochgelly Iron and Coal Co.* (1926), 20 B.W.C.C. 637.

As to industrial accidents and the burden of proof, see 27 Halsbury's Laws (3rd Edn.) 802–810; and for cases see 34 Digest 266 et seq., 463 et seq.

Cases referred to:

(1) *Drylie* v. *Alloa Coal Co.*, 1913 S.C. 549; sub nom. *Alloa Coal Co., Ltd.* v. H *Drylie* (1913), 6 B.W.C.C. 398; 34 Digest 268, *2282iii.*

(2) *M'Luckie* v. *John Watson, Ltd.*, 1913 S.C. 975; 50 Sc.L.R. 770; [1913] 2 S.L.T. 61; 6 B.W.C.C. 850; 34 Digest 268, *2282iv.*

(3) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230; 74 L.J.K.B. 474; 92 L.T. 578; 53 W.R. 641; 21 T.L.R. 444; 49 Sol. Jo. 445; 7 W.C.C. 1, H.L.; 34 Digest 464, *3799.*

I (4) *Victorian Railways Comrs.* v. *Coultas* (1888), 13 App. Cas. 222; 57 L.J.P.C. 69; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 17 Digest (Repl.) 122, *333.*

(5) *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669; 70 L.J.K.B. 837; 85 L.T. 126; 50 W.R. 76; 17 T.L.R. 555; 45 Sol. Jo. 578, D.C.; 17 Digest (Repl.) 122, *335.*

(6) *Pugh* v. *London, Brighton, and South Coast Rail. Co.*, [1896] 2 Q.B. 248; 65 L.J.Q.B. 521; 74 L.T. 724; 44 W.R. 627; 12 T.L.R. 448; 40 Sol. Jo. 565, C.A.; 29 Digest 401, *3178.*

(7) *Cooper* v. *Caledonian Rail. Co.* (1902), 4 F. (Ct of Sess.) 880; 39 Sc.L.R. 660; 36 Digest (Repl.) 197, **1853.*

(8) *Bell* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest (Repl.) 197, **1852.*

Also referred to in argument:

Dunham v. *Clare*, [1902] 2 K.B. 292; 71 L.J.K.B. 683; 86 L.T. 751; 66 J.P. 612; 50 W.R. 596; 18 T.L.R. 645; 4 W.C.C. 102, C.A.; 34 Digest 341, *2759.*

Ystradowen Colliery Co., Ltd. v. *Griffiths*, [1909] 2 K.B. 533; 78 L.J.K.B. 1044; 100 L.T. 869; 25 T.L.R. 622; 2 B.W.C.C. 357, C.A.; 34 Digest 342, *2760.*

Clover, Clayton & Co., Ltd. v. *Hughes*, [1910] A.C. 242; 79 L.J.K.B. 470; 102 L.T. 340; 26 T.L.R. 359; 3 B.W.C.C. 275; sub nom. *Hughes* v. *Clover, Clayton & Co.*, 54 Sol. Jo. 374, H.L.; 34 Digest 273, *2316.*

Blakey v. *Robson, Eckford & Co., Ltd.*, 1912 S.C. 334; 34 Digest 325, *2656i.*

Eke v. *Hart-Dyke*, [1910] 2 K.B. 677; 80 L.J.K.B. 90; 103 L.T. 174; 26 T.L.R. 613; 3 B.W.C.C. 482, C.A.; 34 Digest 271, *2304.*

M'Millan v. *Singer Sewing Machine Co., Ltd.*, 1913 S.C. 346; 50 Sc.L.R. 220; 1912 S.L.T. 484; 6 B.W.C.C. 345; 34 Digest *267b.*

Wicks v. *Dowell & Co., Ltd.*, [1905] 2 K.B. 225; sub nom. *Wilkes* v. *Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 53 W.R. 515; 21 T.L.R. 487; 49 Sol. Jo. 480; 7 W.C.C. 14, C.A.; 34 Digest 266, *2265.*

Fenton v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 72 L.J.K.B. 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684; 5 W.C.C. 1, H.L.; 34 Digest 266, *2264.*

Kelly v. *Auchenlea Coal Co., Ltd.*, 1911 S.C. 864; 34 Digest 275, *l.*

Appeal from a decision of the Second Division of the Court of Session in Scotland (KINGSBURGH, DUNDAS, SALVESEN and GUTHRIE, L.JJ.).

On June 26, 1911, at about 7 a.m., Brown, who seemed to be in his usual good health, started work in No. 2 Pit, Gilbertfield Colliery.

Between 8 and 9 o'clock a.m., in consequence of a wreck in the shaft, all the men in the pit were ordered to ascend to the surface. They proceeded towards the shaft of No. 2 Pit, by which they were usually raised, but on this day they were met by an official who told them to proceed by the communication road to the shaft of No. 1 Pit. Here they had to wait at a mid-landing for about an hour and a half until the men from the lower seam, who usually ascended by this shaft, had been raised.

Whilst waiting a very strong, cold, down draught blew in on B. and his fellow miners. On reaching the surface B. complained of feeling cold and ran part of the way home to try to recover warmth. The next morning Brown went down the pit, but he was unable to start work on account of illness which the arbitrator found was due to the chill incurred on the previous day. He returned home and went to bed, pneumonia supervened, and he died therefrom on July 3, 1911, having been removed that day to the Royal Infirmary, Glasgow. The deceased left a widow and four pupil children, and a posthumous child has been born of the marriage. The arbitrator found that Brown died from the effects of injuries by accident received by him on June 26, while in the course of his employment with the respondents, and awarded compensation to the claimants. On appeal the Second Division of the Court of Session held that there was no evidence on which it could be competently found that Brown sustained an accident arising out of and in the course of his employment, and recalled the award of the arbitrator. The widow appealed.

Moncrieff, K.C., and *J. Keith* (both of the Scottish Bar) for the appellant.

The Lord Advocate (*R. Munro, K.C.*) and *H. W. Beveridge* for the respondents.

Their Lordships took time for consideration.

April 28, 1914. The following opinions were read.

LORD DUNEDIN.—On the assumption that *Drylie* v. *Alloa Coal Co.* (1) was well decided, I am of opinion that this case is ruled by that. I cannot help thinking on perusing the opinion of LORD SALVESEN that he really took the same view, although he did not express a formal dissent from the views of the other members of the Second Division. Here, as there, you have an accident interfering with the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident, and a finding of fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance, depending on some cause other than the accident, which occurs to break that chain of causation. I would refer to *M'Luckie* v. *John Watson, Ltd.* (2), where the wetting which brought on the chill was not a necessary cause of the accident, but was due to the workman's determination not to wait his turn for the cage, but to stand in water in order to get in front of his fellows. As regards *Drylie* v. *Alloa Coal Co.* (1) I was a party to that judgment, and I have no reason to alter the opinion I then formed. I think that the appeal should be allowed and the award of the arbitrator restored, and I move accordingly. **LORD KINNEAR** requests me to say he concurs in this judgment.

LORD ATKINSON.—The difficulties raised by the contention of the learned Lord Advocate on behalf of the respondents arise from his effort to disintegrate, as it were, the compound but injurious effect upon a workman of the forces or agents into contact with which he may by an accident be brought, separating the immediate and primary effect from the ultimate effect and endeavouring to establish a sequence of causation between them. He contended that the accident must, to entitle the injured workman or his dependants to compensation, be the proximate cause of the personal injury, and insisted that the chill sustained by John Brown, the deceased workman, was the proximate cause of his death by pneumonia, and that the accidental breakdown or wreckage of the machinery of the mine in No. 2 shaft, so far from being the proximate cause of this chill, was either a mere historical event unconnected with it or, at least, if a cause of it at all, a very remote cause. I put to him during his argument the following question: Suppose an employer is during the very cold weather in mid-winter driving in his motor car with two servants in front—his chauffeur and another—and suppose that when crossing a bridge over a river a tyre bursts, his car skids and comes into collision with one of the battlements of the bridge with such force and violence that both servants are precipitated into the river below, the one being drowned and the other rescued, yet so tardily as to be thoroughly chilled; that an attack of pneumonia is thereby induced, of which he dies: Would the dependants of the first man be entitled to compensation? The learned Lord Advocate answered in the affirmative. I then asked him, Would the dependants of the second servant be similarly entitled? and he answered in the negative. But can there be any real distinction between these two suppositious cases? The primary accident, the bursting of the tyre, the consequential accidents, the skidding of the car, the collision with the battlement of the bridge, the precipitation into the river are common to both cases. The element into contact with which the deceased servants were brought, the cold water, the same. The injurious effect of this element upon them was different. It smothered the one. It chilled the other so badly that disease supervened. According to the contention of the Lord Advocate, the bursting of the tyre, though it was a primary accident which, through the agency of other accidents consequent on it, brought about the prolonged exposure of the deceased to the action of the cold water, was not the proximate cause of death.

The principle upon which cases should be dealt with under the statute where death or incapacity is caused to a workman by a disease induced by an "injury by accident" is clearly laid down in the well-known "anthrax" case, *Brintons, Ltd.* v. *Turvey* (3). LORD HALSBURY expressed himself thus ([1905] A.C. at p. 233):

"When some affection of our physical frame is in any way induced by an accident we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease. . . . It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequence or results of the injury that has been inflicted."

LORD MACNAGHTEN said (ibid. at p. 234):

"Speaking for myself I cannot doubt that the man's death was attributable to personal injury by accident arising out of and in the course of his employment. The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease which was immediately the cause of death, and would, no doubt, be certified as such in the usual death certificate."

LORD LINDLEY said (ibid. at p. 238):

"In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental."

In the present case there were two shafts to the respondent's mine, the Down Cast Shaft No. 1 and the Up Cast Shaft No. 2. The current of air which ventilated the mine passed down the former shaft. The deceased workman, John Brown, started to work in the mine at 7 a.m. on the morning of June 26, 1911, at a place which was dry, with a good current of air passing through it. Brown and his mates were sweating as they worked; their clothes were somewhat wet from this, not from any other cause. Some breakdown of the machinery connected with shaft No. 2 took place. Brown and his companions were ordered, owing to this, to ascend to the surface, and while proceeding to No. 2 shaft to ascend in the ordinary and accustomed way, they were directed to ascend by No. 1 shaft instead of No. 2. They attempted to do so, but were checked at the mid-landing for one and a half hours, during which the down current of cold air was playing upon them. Brown, the deceased, was badly chilled by this exposure. Pneumonia was thereby induced and he died. Thus, Brown and his companions were, owing to the accidental breakdown of the machinery in No. 2 shaft, placed by the orders of their master in a position where they were, through the accident of the prolonged and abnormal delay, exposed to the action of the current of air during the period while he waited—that exposure was not expected, intended, or designed either by the employer or the workman. It was one of the consequential accidental effects arising from the primary accident, the breakdown of the machinery, just as the prolonged immersion in the river of the servant who was rescued was in the supposititious case I have mentioned one of the consequential accidents of the bursting of the tyre of the motor car. This accidental but prolonged exposure was the cause of "the injury," the chill. The pneumonia was only the disease brought on by that injury.

This case cannot be distinguished from *Drylie* v. *Alloa Coal Co.* (1). There owing to the breakdown of a pump the water in a mine accumulated so that the workmen had to stop work. They went to the shaft to ascend and were kept waiting for twenty minutes up to their knees in cold water, the cold air descending upon them. This abnormal exposure caused to the deceased a chill from which disease was set up. The abnormal exposure to the action of the cold air and cold water in that case was on all fours with the abnormal exposure to the current of cold air in this case, and that the exposure in the latter case was quite as much an accident as in the former, and the chill quite as much an injury by accident in the latter case as in the former.

Therefore, the question of law stated by the learned sheriff-substitute for the opinion of the court should be answered in the affirmative, and this appeal allowed with costs.

LORD SHAW.—This appeal arises out of an arbitration under the Workmen's Compensation Act, 1906. Sheriff-Substitute Shennan, an experienced arbitrator, sets forth the facts in the stated case and says:

> "In these circumstances I found that the deceased, John Brown, died from the effects of injuries by accident received by him on June 26, while in the course of his employment with the appellants, and awarded compensation."

There is no ground for holding that the learned sheriff misdirected himself in law; and that his finding was contrary to or in no reasonable sense in accordance with the facts proved is equally unfounded. One pit shaft in this mine was blocked by an accident; a dislocation of the working arrangements ensued; the men had to be sent by another shaft under circumstances which exposed them to severe chill; this chill in one workman's case brought on pneumonia, and of that the workman died. It appears to me both legally and philosophically incorrect to say that this should not be treated as a chain of causation—with the accident at the one end as cause, and death at the other end as effect. Wherever a chain of causation is alleged to exist it is possible to say that it is broken at a certain point, and to attribute the effect to a fresh and intervening factor. The sheriff-substitute as the judge of the facts did not find that the chain of causation was broken in this way. And I see no ground for saying that he erred. The judgment of the Second Division which recalled the arbitrator's finding and award should therefore be reversed.

It would be unnecessary to say more but for certain considerations, to which out of respect for the learned judges of the Second Division it appears to me proper to allude. In the first place, the judgments distinguish the present case from a decision by seven judges of the Court of Session in Scotland (LORD SALVESEN dissenting) in *Drylie* v. *Alloa Coal Co.* (1). In that case by an accumulation of water in a mine (caused by a breakdown in the pumps) the workmen were forced to stand knee-deep in water; one of the men was in consequence seized with pneumonia, and he died. The Act was held to apply and an award of compensation was made. I should have said that the principle of the present case was concluded by that applied in *Drylie* v. *Alloa Coal Co.* (1). The cold element in the one case was water and in the other air. But, as LORD SALVESEN indicates, there does not appear to be any other real ground of distinction between the two cases. In this I agree. Indeed, I do not entirely understand why that learned judge, accepting the *Drylie* decision and not distinguishing the two cases, did not tender his dissent from the present judgment. But the learned counsel for the respondents were within their rights in maintaining that the present judgment is unanimous. Before passing from *Drylie* v. *Alloa Coal Co.* (1) I desire to remark upon a passage in the judgment of LORD DUNDAS, who said:

> "The circumstance of Drylie finding himself immersed to the knees in icy cold water was abnormal; it, in its turn, was due to an abnormal cause—the stoppage of the pump while men were at work in the pit; and if the pneumonia of which he died was, in fact, caused by his immersion, I think the elements of an 'accident' are here present."

I am aware that, in the present case, the views of LORD DUNDAS do not exactly equate with those just cited from that report. But these sentences do give such a clear statement of a chain of causation, connecting the whole with the statutory provision, that I should have adopted them if *Drylie* v. *Alloa Coal Co.* (1) had directly reached this House.

I think that the present case was ruled by the judgment in that case and the departure in the present case from its principles makes the present appeal of importance, and that particularly in regard to one point. The point appears most clearly from the opinions of LORD SALVESEN, and it is this: that countenance appears to be given to the view that the compensatory provisions of the statute cannot be invoked unless injury be caused by "physical impact." This is a

most serious and a most disturbing and erroneous proposition. I think counsel for the appellant in his able address and citation of authority was right so to treat it. LORD SALVESEN elaborately argues and illustrates the point in *Drylie* v. *Alloa Coal Co.* (1). In his view the pneumonia which supervened to the workman may have not been causally attributable to the accidental exposure, but to neglect. But while this is so, the learned judge does give some countenance to the idea that physical impact, or, indeed, direct lesion, is required in order to enable compensation to be given. He observes, for instance:

> "The only case decided in the House of Lords, so far as I am aware, where a death from disease not preceded by some direct lesion, was held to be a death resulting from injury by accident in the well-known anthrax case."

And in another passage he says:

> "In all such cases, if we are to affirm the judgment of the sheriff-substitute, it will be open for the arbitrator to find, if he were bold enough to attribute the disease to a particular exposure resulting from some accidental occurrence, that it was the result of accident within the meaning of the Act."

I pass by the form of the expression, "if he were bold enough to find," and take the learned judge to mean "if he found as a fact that" the disease arose from exposure, etc.

The statute itself in no way limits the causal connection between accident and disease to cases of physical impact, nor does it treat the connection itself as anything extraordinary. In the section dealing with industrial diseases it provides that:

> "Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply if the disease is a personal injury by accident, within the meaning of this Act."

In the second place, such a restriction, excluding all cases, however serious—say of shock and the like—unless physical impact or lesion had occurred, has, in my opinion, no justification in the state of the authorities. The one case cited in its favour is *Victorian Railways Comrs.* v. *Coultas* (4). The case was decided by the Privy Council, and the judgment was in form merely on remoteness of damage.

> "They [their Lordships] are of opinion that the first question, whether the damages are too remote should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

But there undoubtedly are observations by SIR RICHARD COUCH of a more definite character. For instance, the learned judge, deprecating the extension of liability, does say (13 App. Cas. at pp. 225, 226):

> "In every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury,"

and he observes on the chance of a wide field for imaginary claims. In the present case and in *Drylie* v. *Alloa Coal Co.* (1) one may discern traces of similar views. But in England, in Scotland, and in Ireland alike, the authority of *Victorian Railways Comrs.* v. *Coultas* (4) has been questioned, and has been denied. I am of opinion that the case can no longer be treated as a decision of guiding authority. The subject was, if I may say so, examined with much erudition and care by the lords justices in *Dulieu* v. *White & Sons* (5), and *Victorian Railways Comrs.* v. *Coultas* (4) was held not binding. I agree with the judgment of KENNEDY, L.J., in his observations thereon. It may be added that these were in line with certain dicta of LORD ESHER on the same topic in *Pugh* v. *London, Brighton, and South Coast Rail. Co.* (6). In Scotland, LORD STORMONTH DARLING, in *Cooper* v. *Caledonian Rail. Co.* (7), stated broadly and emphatically that the *Victorian*

Railways Comrs. v. *Coultas* (4) was no part of the law of Scotland. Probably, however, no better analysis of it has been made than by PALLES, C.B., in the Irish case of *Bell* v. *Great Northern Rail. Co. of Ireland* (8), and I adhere to and approve of that judgment. I should add that other cases were cited showing it to be fully established by authority that physical impact or lesion is not a necessary element in the case of recovery of damage in ordinary cases of tort.

On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour—always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused the dislocation of a limb, on what principle can it be denied if the same occurrence has caused an unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail—in the incidence of justice or the principle of law—is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction.

The other case, of which the present is an example, is much narrower—a case of injury to the body, a physical injury not caused by physical impact. On the point of the principle of liability, what is there to distinguish the case of a man who is drowned in a scuttled boat from that of another who is immersed and sustains a chill resulting in his death? Make the difference still narrower—as narrow, for instance, as between this case and *Drylie* v. *Alloa Coal Co.* (1). The fatal pneumonia of one man is produced by his standing in cold water, and of a second by his standing in cold air. How the particular element which was the medium through which the producing cause operated towards the fatal effect should have any legal effect in altering either the range or the canon of liability does not appear to my mind. The truth is that the difference between all such cases is not one of principle, but is one of the things which becomes more notable as a point of difficulty, or in the practice of the law on the matter of proof. But wherever the causal connection between occurrence and result be established, the principle to be applied is the same. The difficulty of establishing the causal connection may be much greater in the one case than in the other, and courts of law are justified in demanding in all cases, and especially where external signs are wanting, that the relation of cause and effect be sufficiently established. If it be, the liability follows. I am of opinion that the appeal should be allowed with costs.

LORD PARMOOR.—This is an appeal against the decision of the Second Division of the Court of Session in Scotland upon a case stated in an arbitration under the Workmen's Compensation Act, 1906. The arbitrator found that John Brown died from the effects of injuries by accident received by him on June 26, 1911, while in the employ of the respondents, and awarded compensation to the appellant.

[HIS LORDSHIP stated the facts and continued:] It was not denied by counsel for the appellant that in order successfully to maintain a claim for compensation under the Workmen's Compensation Act, 1906, there must be an accident in the ordinary popular meaning of that term, and an injury attributable to such accident. The accident relied upon is the wreckage of the shaft, and the injury the chill from which Brown took pneumonia and died. The answer of the respondents is that the wreckage of the shaft should be considered merely as an historical incident in the narrative of the case, and as too remote a factor to which to attribute the injury, and that in any case the injury cannot fairly be attributed to the wreckage of the shaft. I cannot assent to this argument on behalf of the respondents. The delay in the landing where the chill was caught appears to me to be clearly attributable to the wreckage of the shaft, and but for such wreckage would not have occurred. The incidents are closely

connected, and cannot be treated as independent and detached factors. On the other hand, it is not questioned that the delay on the landing in a draught did cause the injury which resulted in Brown's death. There are both the necessary elements to maintain a claim, a definite accident and injury fairly attributable thereto. It is not material that the wreckage of the shaft did not result in physical impact causing physical injury, or that no one could have foreseen the delay on the landing, and the subsequent chill, as a probable or natural result of the wreckage of the shaft. Such considerations do not arise in a claim under the Workmen's Compensation Act. The workman under the Act is as much entitled to compensation if death results from exposure consequent on and attributable to an accident as he would be if death had resulted from immediate physical injury. A number of authorities were quoted by the counsel for the appellant. It is only necessary to refer to two of them. *Victorian Railways Comrs.* v. *Coultas* (4) was quoted as an authority for the doctrine that in ordinary accident cases some form of physical impact is a necessary element to found a claim for damage. The case does not appear to support this contention. The following passage occurs in the judgment (13 App. Cas. at p. 226):

> "They [their Lordships] are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

The second case is *Drylie* v. *Alloa Coal Co.* (1). I am unable to distinguish this case from the present case. It cannot be material, for a claim under the Workmen's Compensation Act, whether the chill resulted from exposure to a current of air or to cold water, so long as the exposure is attributable to the accident, and has caused the injury on which the claim to compensation is founded. In my opinion, the appeal should be allowed, and the question of law stated by the arbitrator for the opinion of the court should be answered in the affirmative.

Solicitors: *Deacon & Co.*, for *Simpson & Markwick*, Edinburgh, and *Hay, Cassels & Frame*, Hamilton; *Beveridge, Greig & Co.*, for *W. & J. Burness*, Edinburgh, and *W. T. Craig*, Glasgow.

[*Reported by* W. C. Bras, Esq., *Barrister-at-Law.*]

LARKIN AND OTHERS v. LONG

[House of Lords (Viscount Haldane, L.C., Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Parmoor), March 5, 8, April 29, 1915]

[Reported [1915] A.C. 814; 84 L.J.P.C. 201; 113 L.T. 337; 31 T.L.R. 405; 59 Sol. Jo. 455]

Trade Union—"Trade dispute"—Dispute between employer and employers' association—Employees' trade union officers acting in support of association—No dispute between employer and employees—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3, *s.* 5 (3).

Conspiracy—Contract—Inducement to break—Contract of service.

A dispute only between an individual employer and an employers' association is not a "dispute between employers and workmen, or between workmen and workmen," and so cannot be a "trade dispute" within the meaning of the Trades Disputes Act, 1906.

An employer of labourers, who were members of a trade union, refused to join an employers' association, promoted by the labourers' trade union. The labourers did not insist on their employer joining the association, but the defendants, officers of the union, acting in concert with members of the employers' association, induced the employer's labourers to break their contracts with him and cease working for him, thus causing the employer pecuniary loss. In an action by the employer against the defendants for damages for conspiracy to induce breaches of contract by the workmen, the defendants pleaded that the acts complained of were done by them "in contemplation or furtherance of a trade dispute," and so, by virtue of the Trades Disputes Act, 1906, s. 3, were not actionable.

Held: this defence failed, because a dispute between an employer and employers was not a "trade dispute" within the section.

Decision of the Irish Court of Appeal, [1914] 2 I.R. 285, affirmed.

Quinn v. *Leathem* (1) [1901] A.C. 495, followed.

Notes. Considered: *Valentine* v. *Hyde*, [1919] 2 Ch. 129. Distinguished: *Sorrell* v. *Smith*, [1925] All E.R.Rep. 1. Referred to: *Pratt* v. *British Medical Association*, [1918–1919] All E.R.Rep. 104; *Ware and De Freville, Ltd.* v. *Motor Trade Association*, [1920] All E.R.Rep. 387.

As to torts arising out of the operations of trade unions, see 32 Halsbury's Laws (2nd Edn.) 516–524; as to meaning of "trade dispute," see ibid., 526–529; for cases see 43 Digest 120–122; and for the Trades Disputes Act, 1906, see 25 Halsbury's Statutes (2nd Edn.) *1267*.

Cases referred to:

(1) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 285; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.; 43 Digest 112, *1179*.

(2) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 42 Digest 987, *169*.

(3) *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

(4) *R.* v. *Druitt, Lawrence and Adamson* (1867), 16 L.T. 855; 10 Cox, C.C. 592; 43 Digest 112, *1175*.

(5) *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales*, [1902] 2 K.B. 732; 71 L.J.K.B. 994; 87 L.T. 493; 51 W.R. 115; 19 T.L.R. 20; 47 Sol. Jo. 29, C.A.; 43 Digest 116, *1204*.

(6) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441, H.L.; 43 Digest 114, *1186*.

(7) *Conway* v. *Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 25 T.L.R. 779; 53 Sol. Jo. 754, H.L.; 43 Digest 120, *1237*.

Also referred to in argument:

Ward, Lock & Co., Ltd. v. *Operative Printers' Assistants' Society* (1906), 22 T.L.R. 327, C.A.; 15 Digest (Repl.) 919, *8827*.

Bulcock v. *St. Anne's Master Builders Federation* (1902), 19 T.L.R. 27; 47 Sol. Jo. 32; 43 Digest 115, *1192*.

Dallimore v. *Williams and Jesson* (1912), 29 T.L.R. 67; 57 Sol. Jo. 77, C.A.; subsequent proceedings (1914), 30 T.L.R. 432, C.A.; 43 Digest 121, *1238*.

Appeal by the defendants from an order of the Court of Appeal in Ireland, which affirmed the judgment of the King's Bench awarding the plaintiff £200 damages for conspiracy inducing his workmen to break their contracts with him, and decided that the acts of which the plaintiff complained were not done by the defendants in contemplation or furtherance of a trade dispute within the meaning of the Trades Disputes Act, 1906. The proceedings in the Irish Courts are reported sub nom. *Long* v. *Larkin*, [1914] 2 I.R. 285. The facts, which are summarised in the headnote, are stated in full in the opinions of LORD ATKINSON and LORD PARMOOR.

The action was tried before PALLES, C.B., and a special jury, who found that the defendants had induced the dock labourers in the plaintiff's employment to break their contracts with him, and that there was at that time no dispute between the plaintiff and his dock labourers within the meaning of the Trades Disputes Act, 1906, and they assessed the damages at £200, and judgment was entered in accordance with the verdict. The defendants applied to the Divisional Court (GIBSON and KENNY, JJ.) for judgment or new trial, but the application was refused and their appeal to the Court of Appeal (O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.) was dismissed.

The material sections of the Trades Disputes Act, 1906, are:

Section 3. "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Section 5 (3). "In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment on the terms of the employment or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. . . ."

Serjeant Sullivan and *H. R. Poole* (both of the Irish Bar) for the appellants. *J. H. Campbell, K.C.*, *Timothy Healy, K.C.*, *Hanna, K.C.*, and *K. B. Dockrell* (the two former of the Irish and also of the English Bar, and the two latter of the Irish Bar only) for the plaintiff, were not called on to argue.

The House took time for consideration.

April 29, 1915. The following opinions were read:

LORD ATKINSON.—This is an appeal against an order of the Court of Appeal in Ireland, dated Dec. 19, 1913, affirming an order of the King's Bench Division of the High Court of Justice in Ireland dated June 7, 1913. By this latter order the application of the six defendants in the action to have the judgment entered for the plaintiff, the present respondent, dated Dec. 6, 1912, set aside, and judgment entered for the defendants, or in the alternative for a new trial, was refused with costs. Three of the defendants—namely, William Long, Newman and Donohoe—are members and officials of a certain trade union or association of stevedores styled the Stevedores' Association. Stevedores are

employers of labour. Their business is to load and discharge ships for reward paid by the owners of the ships, and the staff which they hire for this work are dock labourers. In Dublin these dock labourers are all members of a trade union styled the Transport Workers General Union, of which the appellant Larkin is the secretary and the appellants Redmond and Hopkins are also officials. Larkin desired to get more favourable terms for the members of his association from the stevedores of the port. The stevedores represented to him that the remuneration they received from the shipowners for their work was not sufficient to enable them to comply with this demand, and at Larkin's suggestion the great body of the stevedores entered into this trades union association, the policy and object of which was to secure for themselves increased remuneration from shipowners by refusing to work at any scale less than that which they themselves had adopted. The plaintiff, Mathew Long, never had any dispute with his dock labourers. He refused to join the association. Severe and illegitimate pressure was put upon him to force him to do so, and on Aug. 19, 1912, he instituted the action against the six defendants out of which this appeal has arisen, claiming damages and an injunction. His cause or causes of action are succinctly set forth in the third paragraph of the original statement of claim. It runs thus:

> "In or about the months of August and September, 1912, the defendants wrongfully and maliciously conspired and agreed to combine amongst themselves and did so combine to procure, cause, and induce the aforesaid workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further procure, cause, and induce dock labourers and others to refuse to work for the plaintiff. In furtherance and pursuance of the said conspiracy the defendants did in fact procure, cause, and induce workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further in fact procure, cause, and induce dock labourers and others to refuse to work for the plaintiff."

It will be observed that the object of the conspiracy is alleged to have been, first, to induce the plaintiff's workmen to leave his employment, and, second, to induce dock labourers and others not to work for him, the overt acts being that they in fact induced his workmen to leave his employment, and in fact procure dock labourers and others not to work for him. I think it is rather unfortunate that the trial did not proceed upon the pleadings as they stood. Having regard to the evidence given, questions might, I think, have been framed for the jury upon it somewhat similar to questions 2 and 3 framed in *Quinn* v. *Leathem* (1). However, at the instance of the counsel for the plaintiff, an amendment to the statement of claim was by the leave of the judge made at the trial, which, while by no means improving the pleading, accounts for the form in which the questions ultimately left to the jury were in fact framed. The amendments run thus:

> "The defendants wrongfully and maliciously conspired and agreed amongst themselves wrongfully and without legal authority to force the plaintiff to join the Stevedores' Association, which the plaintiff had a legal right to refuse to join. And the defendants in pursuance of the said agreement did, by threats and menaces and other unlawful means, endeavour to force the plaintiff to join the Stevedores' Association. And in further pursuance of the said conspiracy in agreement, did procure certain dock labourers who were willing to work for the plaintiff not to work for him, and in further pursuance did induce and produce labourers who had engaged to work for the plaintiff to break their contracts of employment and leave the plaintiff's employment, whereby actual money loss was sustained by the plaintiff."

The first and second questions were left by the Chief Baron, who tried the case, to the jury to deal with the first and second paragraphs of this amendment, the third with the last portion of it.

I do not think that it is at all necessary to embark on a critical examination of the authorities dealing with the law touching actions for conspiracy, for the simple reason that the quantum of the damages not being objected to, the inducing of a servant or workman to break his contract with his master is an actionable wrong against the master, whether committed by one or many persons, and whether committed in pursuance of a malicious conspiracy to injure the master, or deliberately and maliciously but with no more concert or agreement than is usually involved in almost all joint wrong-doing. In *Lumley* v. *Gye* (2) the wrong sued for was committed by the defendant acting alone. He, unaided, succeeded in persuading Miss Wagner not to sing at the Queen's Theatre. I think there was ample evidence to sustain the findings of the jury on questions 1 and 2. In answer to the third question, taken in connection with the answer to question 1, the jury found that the six defendants, in pursuance of an agreement to force the plaintiff, Mathew Long, to join the Stevedores' Association, induced and procured certain dock labourers, who had engaged to work for him, and were actually working for him in discharging a ship called the *Sieben Jarl*, to break their contracts and leave his employment. I did not understand that it was seriously contested—it could not, I think, be successfully contested—that there was not ample evidence to sustain this finding. Of course, it must be confined to what took place before the writ was issued. Much of the argument devoted to this question was directed rather to show that, owing to the terms of the contract of hiring entered into between the plaintiff and his dock labourers, the amount of damage found could not have accrued from this tortious act. I do not think it is at all clear, however, upon the evidence, what has to be the precise duration of the employment of these labourers, or when their hiring was at an end, or what the precise nature of the contract the respondent had entered into with the owner of the *Sieben Jarl* for her discharge, but however that may be, your Lordships are not concerned on this appeal with the question of the quantum of the damages.

An objection has been made, however, to this finding on the strangest ground —namely, this, that owing to an alleged misdirection by the Chief Baron, three members of the Stevedores' Association—namely, William Long, Newman, and Donohoe—have been found guilty equally with the three appellants of the tort mentioned in the third question. Yet these three—additional tortfeasors—are apparently satisfied with their position. They are not parties to this appeal. The appellants, however, though they have nothing to complain of in the way of misdirection against themselves, ask to have the verdict set aside, because they have, through the alleged misdirection, got companions in misfortune to whom they object. The alleged misdirection consists in this. The jury came into court with an answer to the third question implicating the three appellants alone. The Chief Baron pointed out to the jury that they had only answered the question as to three of the six defendants charged, and sent them back to answer the question as to the three remaining defendants. That was a perfectly proper course. If the jury thought the three omitted defendants were not guilty of the tort charge, it was the right of these latter to have a finding in their favour to that effect. One of the jurors then asked the Chief Baron whether they had any evidence against the three defendants in reference to whom they had been silent, and he replied, "That if there was an agreement among six, and three of them do acts in pursuance of the agreement, the acts are the acts of the six." It is quite obvious, however, that the Chief Baron in these observations was not applying to all agreements, or to any act done in pursuance of them, or to any agreement other than the agreement mentioned in question 3, about which the jury were in a difficulty, or to any acts done in pursuance of that agreement other than the acts mentioned in the question. It is, I think, quite impossible to suppose that the jury understood his observation in any other sense, and so confined, the so-called misdirection was, in my view, perfectly right in point of law. But even if it were not so, I do not think the appellants would have any right what-

ever to object to the verdict for this misdirection, as it does not affect them. The jury have found that the Acts mentioned in question 1, 2, and 3 caused actual money loss to the plaintiff.

The next ground relied on by the appellants in support of the appeal was that set forth in the fifth paragraph of their defence, to the effect that at the time the things complained of were done by them a trade dispute was pending between the plaintiff, the dock labourers of the Port of Dublin, and the Transport General Workers' Union acting on their behalf, relative to the wages and rate of remuneration to be paid by the plaintiff to dock labourers for their work in discharging cargo, and that in refusing to allow any of such labourers to work for the plaintiff, and in withdrawing them from his employment, they were acting as they lawfully might in contemplation and furtherance of such trade disputes within the meaning of the Trades Disputes Act, 1906. The jury have found on the issues raised on this plea that there was no dispute between the plaintiff and the dock labourers. And they have also found that the dispute was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought the appellants to assist. And further, that the labourers did not insist that the plaintiff should become a member of the Stevedores' Association.

There was, in my opinion, ample evidence to sustain all these findings. The evidence of the two defendants, William Long and Newman, would be quite sufficient for that purpose in itself. It was plain upon the evidence that the only dispute which existed was a dispute between the members of the Stevedores' Association and the plaintiff. The association sought to force the plaintiff to enter its ranks in order that he might thereby be compelled to adopt the scale of remuneration for any dock labourers he might employ which this association had adopted. The appellants, at the request of the association, came to their aid, and sought to bring pressure to bear upon the plaintiff to force him to enter it, by refusing to permit the dock labourers who were members of the Transport Union to work for him. But these officers of the union of employees by so aiding the association of employers in its contest with the plaintiff, another employer, did not change the character of the original dispute. It was from the first a dispute between an individual stevedore and an association of stevedores. The Trades Dispute Act, 1906, has no application to such disputes. It only deals with disputes between employers and workmen and workmen and workmen. This dispute has neither of these. This defence, therefore, wholly fails.

Counsel on behalf of the appellants insisted that the fact that the members of the Transport Union thought it for their own interest to pass a rule that they should not work for a stevedore who was not a member of the Stevedores' Union was quite legitimate, that they were not bound to work for him or for any other person for whom they did not choose to work—and were, in the legitimate promotion of their own interest, entitled, within the decision in *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (3) to observe that rule, though it might incidentally cause injury to those who desired to employ these workmen, but for whom they themselves did not desire to work. It is undoubtedly true that the members of a trade union need not work for those for whom they do not desire to work. That is the right to personal freedom of action referred to in the following well-known passages from the judgment of LORD BRAMWELL in *R.* v. *Drewitt, Lawrence and Adamson* (4) (10 Cox, C.C. at p. 600) and from the essay of SIR W. ERLE ON TRADES UNIONS (p. 12). They have been many times approved of in your Lordships' House. They respectively run thus:

> "The liberty of a man's mind and will to say how he should bestow himself, his means, his talents, and his industry was as much a subject of the law's protection as was that of his body."

And,

> "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour, or his capital, accord-

ing to his will. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

But it is equally true that the members of trades unions are bound to respect the right of other workmen to work for whom they please so long as they do nothing illegal, and are also bound to respect the right of an employer to undertake any work he pleases to undertake, and to employ what workmen he chooses, on whatever terms they both agree to unless there is something unlawful in his action. If, therefore, any two or more members of a trade union, whatever its rules may be, wilfully and knowingly combine to injure an employer by inducing his workmen to break their contracts with him, or not to enter into contracts with him, resulting in damage to him, that is an entirely different matter. That is an invasion of the liberty of action of others, and has no analogy to the action of the defendant in the *Mogul Case* (3), for there, as LORD HALSBURY pointed out in *Quinn* v. *Leathem* (1), no legal right had been interfered with, no coercion of mind or will had been effected, all were left free to trade on what terms they willed, and nothing was done except in rival trading which could be supposed to interfere with the appellant's interest.

The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence to an action for the breach of any contracts they have entered into: *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (5), and still less is it a defence to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are. I am clearly of opinion that the decision appealed from was right, and should be upheld, and the appeal should be dismissed with costs. The **LORD CHANCELLOR** desires me to say that he concurs in this judgment.

LORD PARKER OF WADDINGTON.—Notwithstanding the arguments addressed to your Lordships by counsel for the appellants, this case seems to me to be reasonably plain. The jury have found: (i) That there existed an agreement or combination between the defendants to force the plaintiff to join the Stevedores' Association; (ii) that, pursuant to this combination or agreement, the defendants induced or procured dock labourers who had engaged to work for the plaintiff and who were then actually working for the plaintiff to break their contracts and leave the plaintiff's employment; and (iii) that the said acts caused actual money loss to the plaintiff. These findings bring the case within the principle of *Lumley* v. *Gye* (2), approved by this House in *Quinn* v. *Leathem* (1).

The appellants endeavour to displace their primâ facie liability on the principle of *Lumley* v. *Gye* (2) in the following way: First, they contend that there was no evidence before the jury on which they could reasonably find pecuniary loss to the plaintiff; secondly, they say that all that they did was done in contemplation or furtherance of a trade dispute within the Trades Disputes Act, 1906, and rely on that Act as a defence to any civil proceedings.

[HIS LORDSHIP considered the question of pecuniary loss, and the appellants' contention that the plaintiff had not shown that the loss he suffered due to failure to perform his contract was due to the breaches of contract induced by the appellants' acts, and concluded thereon:] Even, however, if the job was an entire one, payment being conditional on completion, and even if the non-completion was not consequent on the breaches of contract alleged, I do not think it clear that the plaintiff could have suffered no damage by reason of the breach. In my opinion the jury might legitimately take into account the necessary dislocation of the plaintiff's business and the injury to his reputation among shipowners. Under these circumstances it cannot be contended that there was no

A evidence of damage to go to the jury, and the amount awarded by them is not in question on this appeal.

I am also of opinion that the second contention of the appellants, to the effect that all that they did was in furtherance or contemplation of a trade dispute within the meaning of the Act of 1906 is completely untenable. A "trade dispute" within the meaning of the Act must be a dispute between employers and workmen B or between workmen and workmen. The jury have found that there was not at the time of the acts complained of any dispute between the plaintiff and the dock labourers, but that the dispute then existing was between the plaintiff and the Stevedores' Association, a union of employers, and that this union brought in the officials of the dock labourers' union to assist. There was, in my opinion, ample evidence to justify these findings. Unless, therefore, as a matter of law, there C must be a trade dispute within the meaning of the Act whenever the officials of a workmen's union are called in to assist one party to a dispute between employers or, indeed, between any other persons, the plaintiff's contention must necessarily fail. The Act of 1906 confers immunity from civil liability in respect of certain acts, if done in furtherance or contemplation of a trade dispute, and to this extent abrogates or curtails the rights of His Majesty's subjects at common law. D An Act of this sort ought, according to principles which have hitherto prevailed in construing Acts of the legislature, to be construed with reasonable strictness and not to be given a meaning wider than the words used will justify. There is nothing, in my opinion, in the Act which would justify the court in holding that a dispute, not in its origin a trade dispute, will become a trade dispute merely because the officials of a workmen's union chose to assist one side or the other. E I do not say that no dispute, not originally a trade dispute, can become a trade dispute by the interference of a workmen's union. I can imagine circumstances where it might, but to hold that every dispute in which the officials of a union chose to interfere must be a trade dispute would, in my opinion, unduly extend the immunity from liability conferred by the Act, and, therefore, unduly curtail the common law rights of other persons. In my opinion the appeal fails.

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LORD SUMNER.—The appellants' grounds of objection to the verdict and judgment against them are (i) misdirection; (ii) that the verdict was against the weight and, indeed, directly contrary to the evidence; (iii) that the plaintiff's evidence showed no cause of action; (iv) alternatively, that, if it did, the defendants were protected from liability by reason of the Trades Disputes Act, 1906, G s. 3. Of the directions actually given to the jury by PALLES, C.B., your Lordships have no admissible record beyond what may be collected from the learned judge's report. It shows nothing exceptional in this regard. Counsel for the defendants submitted careful requisitions and objections after verdict as well as before, but there is no note of any objection of submission directed to the terms of the summing up. In any case misdirection would not avail unless it appeared to be H such as might reasonably be supposed to have affected the verdict. I can find no materials on which the appellants can found an argument on the first head. Complaint was also made that the plaintiff was allowed to amend his statement of claim at a very late stage, and that the questions for the jury were directed rather to the amended case than to that originally pleaded. The question of amending the pleadings was in the learned judge's discretion, and, except as to I costs, immaterial, unless it was such as to bias or mislead the jury or to place the defendants at some disadvantage in respect of the evidence called. The latter is not suggested, the former would be prevented or corrected by a proper summing-up, and there is nothing to show that the summing-up was defective in this regard.

Heads (ii) and (iii) may be dealt with together. Whatever else was alleged and found, the plaintiff alleged and the jury found that the defendant Hopkins, acting with the concurrence of his co-defendants Larkin and Redmond (for such is clearly the sense of the finding), induced the plaintiff's employees to break their contracts of service with him during their first spell of work in discharging the

Sieben Jarl, and thereby caused him pecuniary damage. It is not, and cannot be denied that this gives a good cause of action, though the Trades Disputes Act may be an answer to it. If there was evidence to support it, so far the verdict must stand. Damage is of the essence of this cause of action, and it is said that there is no evidence that any was occasioned. There was no appeal from the quantum of damages given by the jury. Large as they are, they must be taken to be correct, if any damage was proved. Even if the terms of the plaintiff's contract with the shipowner were such that he was entitled to no remuneration unless and until he had completely discharged the ship, I do not think it can be said that the admitted act of calling off his labourers in breach of their contracts did not evidence such pecuniary injury to him in his business as to found the action. Presumably he came under liability to the shipowner for his failure to complete the discharge. In any case, he was to be remunerated on the basis of a money rate for a quantity standard of work done, and he was not cross-examined or contradicted as to this. Presumably he would be entitled to payment pro rata, which would be sufficient to provide a profit, though only a small one. If so, that profit was lost. It is said that the ordinary stevedore's contract is entire, and that he would be entitled to nothing till the ship was discharged. Hence he lost no profit by the breach of the workmen's contracts, for the performance of those particular contracts alone would have brought him none, and he lost nothing out of pocket, for he paid them nothing. However probable it may be that his contract was entire, this was not formally admitted, and cannot be assumed merely because, as is stated, the contention of the defendant's counsel to that effect has passed sub silentio. The jury's findings, Nos. (i), (ii), and (iii), amount to an express finding that what the defendant Hopkins did was done in pursuance of an agreement between himself and his co-defendants to force the plaintiff to join the Stevedores' Association, which is sufficient to make all the appellants primâ facie liable, if there was evidence to support it. I do not understand the objection made to the course taken by the learned judge when the jury first returned their answers to the issue paper. He drew attention to their omission to deal with question 3 as affecting three of the defendants. I think he was quite right. The jury had not meant to acquit them under this head; they had evidently failed to observe the full scope of the question.

I cannot doubt that there was evidence upon which the jury could find against the appellants, as they did in this regard. Under the circumstances it is obvious that part of the agreement to form a Stevedores' Association was to force any stevedore to join who might wish to stand out. The fact, if it be one, that the plaintiff was at first supposed to be willing to join, or to have joined already, is immaterial. There was a continuing agreement, and, when he declined to join, it clearly was part of the agreed plan to compel him to do so. To take any other view of the matter would do complete injustice to the business acumen and tactical skill of the appellants under the circumstances. I think, therefore, that it becomes unnecessary to consider whether the plaintiff did not equally succeed in establishing his cause of action upon the principle of *Quinn* v. *Leathem* (1), or to discuss the form in which this matter was left to the jury, but I do not wish to be supposed to dissent from the decisions upon this head which were given in the courts below.

The remaining, and I think the only real question, is whether the Trades Disputes Act, 1906, affords a defence. Here the burden of proof was on the defendants to show that what Hopkins did, with the concurrence of his co-appellants, was done in furtherance of a trade dispute as defined by the Act. The jury found the contrary. They were the judges of the credibility of the witnesses, who swore that between the plaintiff and his employees there was no dispute at all. This they accepted. The appellants' case is that the admitted facts constituted a statutory trade dispute nevertheless. Those facts are that the officials of the Transport Workers' Union, the present appellants, acting in purported furtherance of the interests of the members of the Union in their trade,

A and confident (I daresay rightly confident) that the members of the Union would act on their orders even though neither previously consulted nor subsequently asked to ratify and adopt their acts, first of all promoted the formation of a trades union of employers, among whose objects (inter alia) was the compulsory inclusion in its membership of all the Dublin stevedores; secondly, promised that trades union the assistance of the Transport Workers' Union; and, lastly, in B performance of that promise procured the plaintiff's employees to break their contracts of service. I think there is an initial difficulty in the appellants' way of which they had been scarcely conscious. Even if the actual dealings with the labourers were done in furtherance of some trade dispute within the meaning of the statute, arising there and then when the men were called off the *Sieben Jarl*, it is quite indisputable that they were also done in furtherance of another C dispute, namely, that arising between the plaintiff and the Stevedores' Association, upon the question whether or not he should become a member of it. This latter dispute was not a trade dispute within the Trades Disputes Act, 1906, s. 5 (3). Is the only ground for calling the acts in question actionable that they induced certain labourers to break their contract, or is there an additional ground, that they were done to further a conspiracy to coerce one employer at the D instance of other employers, and in furtherance of a dispute which was not a trade dispute? Even if the acts in question are excusable because done in furtherance of the trades dispute, which the appellants allege to have existed, and so far are protected by s. 3 of that Act, still, in so far as they were done in furtherance of a dispute to which that Act does not apply, they may stand outside the protection of that Act, and so being actionable at common law, be indefensible. E As this point was not argued I reserve the expression of any opinion upon it.

It seems to me, however, impossible upon the facts proved and admitted, and in face of the jury's finding, to say that there was at any time any dispute between employers and workmen at all. The plaintiff complied, and intended to continue to comply, with all the requirements of the Transport Workers' Union, both as to wages and hours and conditions of employment. With him his employees were F quite content; they had no quarrel with him and wished for none. They did as the Transport Workers' Union delegate told them, but the dispute which he was engaged in furthering had nothing to do with their "employment or non-employment or the terms of the employment or the conditions of labour." It was solely a dispute between one employer, the plaintiff, and sundry others, the other stevedores and the present appellants, which in its turn had as its object the G prosecution of an ulterior dispute between one group of employers, the stevedores, and another—namely, the shipowners of Dublin severally or collectively. I think that the observations of LORD MACNAGHTEN on the very similar position in *Quinn* v. *Leathem* (1) are much in point. He said ([1901] A.C. at p. 511):

> "So far as I can see there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was H quite willing that all his men should join the union. . . . There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce, in order to compel him to do harm to Leathem and so enable them to wreak their vengeance on Leathem's servants, who were not members of the union."

I It was contended that, as the appellant Larkin promoted the Stevedores' Association in purported furtherance of the interests of the Transport Workers' Union, any dispute which arose between the association of employers and another employer comes to be a statutory trades dispute by reason of its supposed effect on the interests of the employees. The contention is unfounded. There is no more a statutory trades dispute here than there was between Quinn's union and Munce in *Quinn* v. *Leathem* (1). If B. and C. quarrel about the interests of A., that is not A.'s quarrel; still less is it A.'s quarrel when neither A. nor B. has any wish to dispute at all, and the whole object of the dispute which C. forces

upon B. is to bring about the coercion of D., a state of things from which it is supposed that benefit may ultimately reach the passive and placable A. A

One point remains, the form of the judgment for damages. The now appellants say that, even though they were rightly adjudged to be liable, they can require the judgment to be set aside if they can show that their co-defendants, who were also adjudged to be liable, but who do not appeal, had a good defence to the action. They are entitled, it is said, though liable by themselves, to refuse to B stand for ever on record as liable in such company; in other words, that a judgment debtor, who has no grounds for appealing himself, may be relieved from the judgment because a co-defendant might have appealed successfully if he had cared to do so. No authority is cited for this proposition, and I am not minded to make one, but having failed to apprehend on what legal basis the argument is supposed to rest, I must confess my inability to answer it further. I think that C the appeal should be dismissed.

LORD PARMOOR.—The plaintiff has for many years carried on the business of a stevedore in the port of Dublin. The appellant Larkin is secretary, and the other appellants are members of the Irish Transport Workers' Union, founded in Dublin in 1904. The appeal is from an order of the Court of Appeal in Ireland D refusing to set aside an order of the Divisional Court of the King's Bench Division, which confirmed a judgment entered for the respondent on Dec. 6, 1912, in an action tried by PALLES, C.B.

There was no Stevedores' Union in Dublin prior to 1912. In 1912 Larkin issued a circular to all the stevedores in Dublin—about twelve in number—asking them to meet him at Liberty Hall. The meeting took place in June and the respondent E was present. At this meeting Larkin explained a scheme for alteration in the conditions of labour in the discharge of vessels in the port of Dublin, stating that his object was not directly to increase the wages of each individual, but that more workmen should be employed. The scheme, if adopted, would increase the cost incurred by the stevedores in the discharge of vessels, and at their instance the consideration was adjourned. Shortly after this conference, a meeting of the F stevedores took place in Shaw Street, and the new proposal for the employment of labour in the discharge of vessels in the port of Dublin, which had been printed, was considered. The plaintiff's evidence is that he found both the rate of wages and the terms of employment those in operation in his own business, and that as the proposal did not affect him he had no further interest in it. According to his own evidence the plaintiff was not present at any subsequent meeting. On G June 20th the stevedores assembled at Liberty Hall to further discuss the suggested proposal. The stevedores were willing to agree to the alteration in the conditions of labour if they could get additional payment from shipowners to cover the additional cost. Larkin then proposed that the stevedores should form an association to fix a scale of payment from the shipowners, and said that he would give his help in seeing that no union man would work for any stevedore H who was not a member of the Stevedores' Association. It is clear that the Stevedores' Association was formed some time in July, and that the main object of the association was to obtain additional payment from the shipowners to meet the additional cost of labour which would be incurred under the scheme put forward by Larkin. On July 24 the plaintiff was shown a proposed scale of charges between the Association of Stevedores and the shipowners, but he refused I to join the association on the ground that the high rates would exclude stevedores and that shipowners would not employ them. The plaintiff was told at this interview that Larkin would not allow any man to work for a stevedore who was not a member of the association. On July 27 there was a further meeting between the plaintiff and representatives of the stevedores, when the plaintiff was told that he would get no more men to work for him, as Larkin had promised to assist the association in every way to get their prices, and that, if he did not join, Larkin would withdraw the men from him. On the same evening

A the plaintiff was told that Larkin wanted him, and he went to Liberty Hall, but he did not see Larkin. On Aug. 2, 1912, the plaintiff discharged a ship without interference, and he had no difficulty in obtaining men to work for him. On Aug. 7 a ship, the *Sieben Jarl*, arrived at the port of Dublin. The appellant Redmond called on the plaintiff, asking him to see Larkin. At this interview Larkin told the plaintiff that unless he joined the Stevedores' Association and B charged the same rates he would withdraw the men. The plaintiff made a contract with the shipping agent to discharge the *Sieben Jarl*, and employed for this purpose a gang of men. The men began to work in the ordinary way and had worked about an hour when Redmond and Hopkins, at 7.15, called the men off during the first half-day's employment. Hopkins told the plaintiff that he would be further stopped until he joined the Stevedores' Association. Thirty-three C men were working at the discharge of the *Sieben Jarl* when they were called off. It is clear that at this time these men were under contract for employment with the plaintiff, although the period of such employment is not clearly defined. On Aug. 22 the *Schoona* was in port and the plaintiff obtained the contract to discharge her. The men were halfway down to the ship when Hopkins held up his hand to the men and stopped them and told them they were not to work for D the plaintiff. From Aug. 22 until Sept. 23 the plaintiff did not try to discharge a ship. On Sept. 23 plaintiff tried to discharge the *Thelma*, and he engaged for this purpose forty men. They started to discharge at twelve o'clock, but Hopkins took all the men off and they left. This was the last effort the plaintiff made, and since then he has been prevented from discharging any ship.

On Aug. 19 the plaintiff issued a writ of summons, and the statement of claim E was delivered on Oct. 21. Upon motion made by Serjeant Moriarty, on Dec. 5, to the Chief Baron, the plaintiff was granted liberty to amend his statement of claim by adding two additional paragraphs. Counsel for the appellants argued that this amendment should not have been allowed, but it was a matter within the discretion of the Chief Baron. There is nothing to show that this amendment placed the appellants under any disadvantage, or that there was any con- F fusion in the summing-up of the case to the jury by the Chief Baron. It is unnecessary to refer further to this point.

At the close of the plaintiff's case it was submitted on behalf of the appellants, and also on behalf of the other defendants—Long, Newman, and Donohoe—that there was no evidence proper to be submitted to the jury to sustain the plaintiff's claim, and that there was a trade dispute existing at the port of Dublin on the G occasions complained of by the plaintiff. These objections were overruled, and the Chief Baron left certain questions to the jury. I agree in the opinion expressed in the words of the Chief Baron, that there was ample evidence of acts of each of the defendants which would have been actionable prior to the passing of the Trades Disputes Act, 1906; that consequently it lay on the defendants to show that such acts were done by them in contemplation or furtherance of a H trade dispute as defined by the Act; and that it was competent for the jury to hold that the only dispute was a refusal to allow the dock labourers to work for the plaintiff unless he became a member of the Stevedores' Association.

The findings of the jury are set out in the certificate of the registrar. The jury found that the appellants with the other defendants, who are not appealing, did agree to force the plaintiff to join the Stevedores' Association, and that in pur- I suance of the said agreement they did induce or procure dock labourers who were engaged to work for plaintiff, and were then actually working for plaintiff, to break their contracts and leave plaintiff's employment on the *Sieben Jarl* on Aug. 8, and that the said acts did cause actual money loss to the plaintiff. There was a further finding that the appellants and the other defendants used threats to force the plaintiff to join the Stevedores' Association. In reference to this finding it was contended that the Chief Baron gave a wrong direction when asked by one of the jury, "Have we any evidence as regards the defendants other than the appellants?" The answer of the Chief Baron appears to have been perfectly

Placeholder